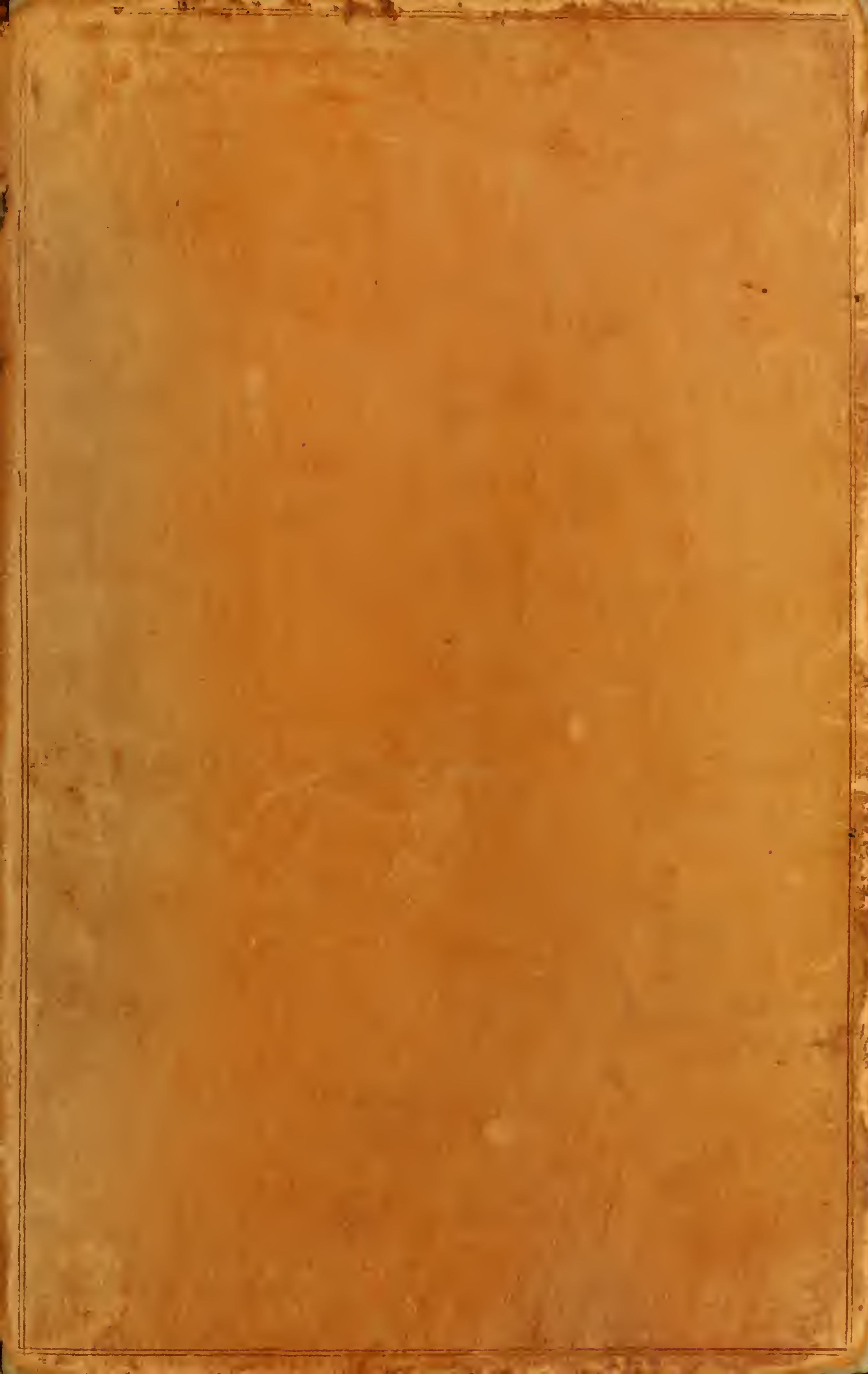

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LEGAL AND POLITICAL

HERMENEUTICS,

OR

PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS,

WITH REMARKS ON PRECEDENTS AND AUTHORITIES.

BY FRANCIS LIEBER, LL.D.,

Author of "Manual of Political Ethics," "Civil Liberty and Self-Government," etc.

THIRD EDITION, WITH THE AUTHOR'S LAST CORRECTIONS AND ADDITIONS, AND NOTES BY

WILLIAM G. HAMMOND,

Professor of Law in the Iowa State University.

ST. LOUIS:
F. H. THOMAS AND COMPANY.
1880.

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PREFACE TO THE THIRD EDITION.

The second edition of the Hermeneutics was published in 1839, and has now been out of print for almost forty years. In 1860 Dr. Lieber carefully revised it, and made additions to both text and notes, expecting to publish a third edition, with a second part, of "Special Hermeneutics, or Legal Rules of Interpretation and Construction," by an eminent member of the New York Bar, Mr. William Curtis Noyes. This plan, however, was not carried out, and Mr. Noyes died December 25, 1863, without having written his proposed part. The text of the present edition, and Dr. Lieber's own notes, have been printed with the utmost exactness from the copy then prepared by him. The notes of the present editor will be readily distinguished.

Dr. Lieber's larger works had already been edited, after his death, by President Woolsey, before this edition was undertaken, at the request of the author's family. The diffidence with which the editor accepted such an invitation has increased rather than diminished as his work advanced. No editing, probably, could give to a new edition the same relative importance which the Hermeneutics enjoyed at its first appearance. It then opened to the American public a new field of thought, and was welcomed with great praise by such distinguished friends of the author as Chancellor Kent and Judge Story. Other writers availed themselves of its guidance, and its contents soon became the common property of our recent writers of law-books and judicial opinions. If the distinguished author had lived to publish the present edition, the work would no doubt have been largely rewritten, and made to fill the same place in the eyes of the present generation that the first and second editions had in those of their fathers. It would be presumption for an editor to expect to do this, under any circumstances; and the expressed wish of Dr. Lieber's family and personal friends, that no additions of any kind should be made to his text, has been conclusive against any such attempt.

Under this restriction, two courses were open to the editor: One was

to add, in the form of detached notes, the practical rules of interpretation employed by the courts, and a collection of the cases illustrating them, substantially like Mr. Noyes's proposed second part of the text. The editor had not only given this plan full consideration, but had prepared a large part of the material for it, — having examined and made notes of more than 1,000 cases, — when he became convinced that it was not advisable. To carry it out with any degree of completeness would have more than doubled the size of the book, and introduced a gross disproportion between the text and notes; to say nothing of the fact that a large part of such notes would have been foreign to and unconnected with any thing in Dr. Lieber's text. But if such notes were not complete, and gave only a selection of the rules and cases upon the topic, they would not have answered the purpose of the practitioner, and therefore would have fulfilled neither one purpose nor the other.

The other course, and the one finally adopted, was to limit the editor's notes and additions strictly to the theory of hermeneutics, and the principles upon which interpretation and construction must always proceed. These formed the subject of Dr. Lieber's work, as his title-page shows: even the abundant illustrations which flowed from a mind so richly stored with historical and political learning are always kept subordinate to the development of these principles. In his foot-notes the editor has added very sparingly to these illustrations, since the text was so amply provided with them, and mostly from events which have happened since the author's last revision, or from legal reports which did not come under his cognizance. In the other foot-notes, and in the series of longer notes which form the appendix, it has been the editor's effort to determine, as exactly as possible, the true province of legal interpretation, and the conditions which must always govern its processes, under any system of positive law whatever, so long as the human mind remains what it is. Even the historical notes are introduced chiefly for this end, — a long experience as a teacher of law having impressed on him no truth more firmly than this: that the surest, and, on the whole, the easiest method of learning the true nature and contents of any legal, political, or ethical doctrine, is to trace carefully the successive steps by which that doctrine has been formed in time. Several of the most important topics of interpretation are discussed in separate notes, but all of them, it is hoped, throw light on the main question, as stated above, and come within the proper limits of editorial duty, as pertinent to the main work. They make, of course, no pretence

to an exhaustive or systematic treatment of the subject, but may serve as contributions of material for such a treatment by some one else hereafter. The editor makes no apology for the large amount of quotation embodied in them, if the matter quoted seems to others, as it does to him, appropriate and valuable. It has been taken chiefly from the civilians and other foreign writers, because these are less accessible to most American lawyers. Our own treatises and reports have been little used, partly because they were familiar to the great majority of those who will probably read this book, and partly for the reason already given in regard to the choice of methods.

For the long delay in the appearance of this edition, the editor is alone responsible. His labor upon it has been performed in the scanty intervals of other very constant and laborious duties; and there has been much more labor and study given to it than may be inferred from the meagre results in print. He only regrets, in closing it, however, that those results are not more worthy of the distinguished name with which he has the honor of associating his own upon a title-page.

W. G. H.

LAW DEPARTMENT, STATE UNIVERSITY OF IOWA.
MARCH, 1880.

AUTHOR'S PREFACE TO THE SECOND EDITION.

ONE of the first articles which I read after my landing at New York, now nearly twelve years ago, was in a paper opposed to the administration of Mr. Adams. The construction of the Constitution formed one of the points on which the writer founded his objections to the president and his party. The subject, as a distinction of political men and measures, was new to me, as political construction in this aspect, is peculiarly American; for, here, the idea of written constitutions, of which it is a consequence, was first realized permanently and on a large scale, although they have existed at earlier dates. My attention was naturally attracted by this subject, and the more attention I paid to the whole political system, in which I have lived ever since, the more important it appeared to me, not, indeed, as a matter of curiosity, but one which involves the gravest interests of right. When, however, the idea of trying to reduce upon ethic principles that which yet appears so unsettled in practical municipal politics, and to find some firm and solid foundations of right and morality, in the rolling tides of party actions, was gradually matured in my mind; when I finally concluded to undertake a work on Political Ethics, I was naturally led to reflect more thoroughly on Construction, and to arrange my thoughts in systematic order. For it seems evident that mathematics alone can wholly dispense with interpretation and construction of some sort, while, on the other hand, without good faith they become desperate weapons in the hands of the disingenuous. They form, therefore, a subject which clearly appertains to legal and political morals. But when I came to write down my observations in their proper connexion, I found that they extended much beyond the limits which could be fairly allowed to a single chapter, nor did the crowd of subjects admit of more than one being occupied by this specific one. They were published in the *American Jurist*,[1] after which I thought I

[1] October number of 1837, and January number of 1838.

might, perhaps, succeed in pruning them to a more proportionate size for the then projected and now half published work. I was told, however, that the article had found favor with the readers of the *Jurist*, and that a reduction would materially injure it, while I was called upon by several professional gentlemen of eminence, to publish the article separately. I followed their advice, the more readily as I was desirous of adding some remarks, which appear to me of sufficient importance, to enlarge the chapter on precedents, and to add a new one on authorities. I have re-written the whole, as a superficial comparison will show, and here lay the result of my labors before the reader. May it do some good. Whether I have succeeded or not, I believe it will be granted on all hands, that the subject is a very important one, and that in countries, as the United States and England, in which civil liberty teaches the citizen to look for one of its great protections in the exact administration of the laws, and a careful avoidance of constant explanation, not interpretation, of the laws by the Public Power — in countries, in which the law is allowed to make its own way, immutable principles and fixed rules for interpreting and construing them, should be generally acknowledged, or if they exist already, in a scattered state, should be gathered and clearly represented, so that they may establish themselves along with the laws, as part and branch of the common law of free countries.

JANUARY 1, 1839.

DEDICATION

OF THE

SECOND EDITION, PUBLISHED IN 1839,

TO

JAMES KENT, LL.D.,

Chancellor of New York.

DEAR SIR: Your name placed at the head of so small a work as this, may appear to many readers not unlike a front of granite, which hides a building of common brick. May the fact that I have been bold enough to grace this book with your name, show to every reader how desirous I was to express my respect for your labors, and my sincere thanks for your indulgence towards mine. May the additions I have made to the Hermeneutics not induce you to change the opinion which you were kindly disposed to take of the first edition. I am, dear sir,

Your respectful servant,

FRANCIS LIEBER.

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CHAPTER I.

No direct Communion between the Minds of Men; Signs are necessary — What Signs are — Utterance — Various Signs used to convey Ideas — Interpretation; its Definition — Etymology of the Word — Interpretation is not arbitrary, but ought to proceed by Rules — Words; what they are — Words most common Signs of Communion between Men — Interpretation of Words — Text.

I. There is no direct communion between the minds of men; whatever may be the thoughts, emotions, conceptions, ideas of delight or sufferance which we feel urged to impart to other individuals, we cannot obtain our object without resorting to the outward manifestation of that which moves us inwardly, that is, to signs. There is no immediate communion between the minds of individuals, as long as we are on this earth, without signs, that is, expressions perceptible by the senses. The most thrilling emotions of a mother's heart, watching over a suffering child, the most abstract meditation of the philosopher, the sublimest conception of the poet, or the most faithful devotion of a martyr in a pure and noble cause, can no more be perceived by others or communicated to them without signs or manifestations, than the most common desires of daily intercourse, or our physical wants for sustenance or protection.

Signs, in this most comprehensive sense, would include all manifestations of the inward man, and extend as well to the deeds performed by an individual, inasmuch as they enable us to understand his plans and motives, as to signs used for

the sole purpose of expressing some ideas. In other words, the term would include all marks, intentional or unintentional, by which one individual may understand the mind or the whole disposition of another, as well as those which express a single idea or emotion. The look of tenderness or tear of compassion is a sign as well as the mile-stone on the road, or the skull and cross bones painted on a vessel which contains deadly poison.

II. There is a primeval principle in man which ever urges him with irresistible power to represent outwardly what moves him strongly within, a pressing urgency of utterance, so that men, through all the many spheres of life and action, feel a want of manifesting without that which stirs their mind or heart; even though there be no direct object which they consciously desire to obtain by this manifestation. The anxious desire of utterance is independent of any principle of utility, that is, of the conscious desire of obtaining a certain end by the manifestation of our inward state.[1] A victory is gained; the

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[1] "Man, in his primitive state, was not only endowed like the brute with the power of expressing his sensations by interjections, and his perceptions by onomatopœia, he possessed likewise the faculty of giving more articulate expression to the rational conceptions of his mind. That faculty was not of his own making. It was an instinct, — an instinct of the mind, as irresistible as any other instinct. So far as language is the production of that instinct, it belongs to the realm of nature. Man loses his instincts as he ceases to want them. His senses become fainter when, as in the case of scent, they become useless. Thus, the creative faculty which gave to each conception, as it thrilled for the first time through the brain, a phonetic expression, became extinct when its object was fulfilled." Max Müller, Science of Language, First Series, pp. 384, 385.

I quote this passage as a confirmation of our author's remark that the desire of utterance is independent of any conscious desire of obtaining a certain end by the manifestation of our inward state; at the same time respectfully dissenting from so much of Müller's theory as supposes this spontaneous process to be peculiar to a primitive and now obsolete condition of mankind. The consciousness of every individual who has carefully watched his own impulses, as well as the observation of such facts as are collected by our author in the text above, seem to furnish sufficient proof that the instinct still exists, only modified, as all such instincts

people rejoice at it; they illuminate their houses, and light bonfires. It may be far in the interior, at a great distance from the enemy. They neither do it to taunt the hostile armies, nor particularly to honor the victors. They do it because their minds and souls are in a state of triumph and rejoicing, and they cannot resist expressing it. A temple is to be built for the reception of those who feel a wish to adore their God. The building is planned and executed in a nobler style than the ordinary dwellings of men, not to flatter the deity or to honor the Most High, for the fabric may be building by those whose religion teaches them that He cannot be flattered by men, that His honor does not depend upon frail mortals, but because their mind, in erecting a church, is in a different frame from what it is in when they build a cottage, and they feel urged to manifest it accordingly. Man dresses differently for a gay feast and for a funeral of his departed friend. Man might sleep on straw as his domestic animals do, and soundly and healthily too, but he has an innate love of the beautiful, and it urges him to surround himself with tasteful furniture, even, not unfrequently, against the dictates of mere utility; although I would observe, in passing, that this innate love of the beautiful which, in some stage of development, we find with all men and with no animal, is one of the broad foundations

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must be, by the possession and use of the means of expression which have been accumulated during past ages. The difference between the primitive and the civilized man in this respect is well compared by Müller himself to the difference in the physical senses; and it now seems to be generally agreed, by those who have had the best opportunities of judging, that the superiority of the savage in scent, vision, etc., has been vastly exaggerated. At all events, it is a mere difference of degree. The civilized man smells, sees, hears, to the full extent his needs require; and so the modern civilized man utters his feelings by a natural impulse, although, in all but exceptional cases, the accumulated stock of recognized vocal signs saves him the necessity of devising a new one. — Ed.

of all industry, but not consciously made so by reflecting utilitarianism or, as it is termed by others, enlightened self-interest; another mind, and a deeper wisdom than human intellect is capable of, has made this one of the first and indestructible foundations of civilization.

One more remark respecting this subject, and I shall turn to what more directly occupies us. I have endeavored, in another work,* to show how indispensably man's individuality is connected with his morality. Had the Creator established a means of direct influence of mind upon mind among men, such for instance as the adherents to the theory of animal magnetism pretend to have found, it would seem that this individuality would be greatly impaired, perhaps totally destroyed. Yet it was the evident plan of our Maker, to link man to man, to lead him to society, and lead this society onward from stage to stage. Absolute individuality, or utterance restricted for the purpose of utility, would have fettered man in the lowest bondage of sordid egotism; and God may have impressed that urgency of manifestation indelibly upon the human soul, as one of the chiefest means of sociability, civilization and elevation. For nearly all that is choicest in mankind is owing first of all to this irresistible anxiety of manifestation.

III. The term Sign has been taken, in the preceding paragraphs, for spontaneous or involuntary manifestations. Involuntary signs are of the highest importance in human life, and therefore in law, as evidences; they may indicate

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* Political Ethics, Vol. 1, Book 1.

the opposite to that which they would mean, if taken as voluntary signs. If the police awaken a person suspected of murder, and he were to exclaim, "I did not murder that man; I am innocent," without having been charged with the crime, this involuntary exclamation, on being suddenly disturbed in sleep, might go far to indicate the very opposite to the positive import of the words. To find out the true meaning of involuntary signs belongs to the sphere of shrewdness, feeling, delicacy or common intercourse, and is hardly capable of being reduced to scientific rules. We have to deal here with voluntary signs only.

The signs which man uses, the using of which implies intention, for the purpose of conveying ideas or notions to his fellow-creatures, are very various; for instance, gestures, signals, telegraphs, monuments, sculptures of all kinds, pictorial and hieroglyphic signs, the stamp on coins, seals, beacons, buoys, insignia, ejaculations, articulate sounds, or their representations, that is phonetic characters on stones, wood, leaves, paper, etc., entire periods, or single words, such as names in a particular place, and whatever other signs, even the flowers in the flower language of the East, might be enumerated.

IV. These signs then are used to convey certain ideas, and interpretation, in its widest meaning, is the discovery and representation of the true meaning of any signs used to convey ideas.

The "true meaning" of any signs is that meaning which those who used them were desirous of expressing. (See sec. VII.).

"Using signs" does not only include the origination of

their combination in a given case, but also the declared or well understood adoption or sanction of them, wherever there are several parties who endeavor to express their ideas by the same combination of signs.[2]

In the case of a compact, for instance, a treaty, contract, or any act of the nature of an agreement, the party who avowedly adopts the contract, treaty, etc., or gives his tacit assent to it, makes as much use of the signs declara-

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[2] "Speech is not a personal possession, but a social; it belongs, not to the individual, but to the member of society. No item of existing language is the work of an individual; for what we may severally choose to say is not language until it be accepted and employed by our fellows. The whole development of speech, though initiated by the acts of individuals, is wrought out by the community. That is a word, no matter what may be its origin, its length, its phonetic form, which is understood in any community, however limited, as the sign of an idea; and their mutual understanding is the only tie which connects it with that idea. It is a sign which each one has acquired from without, from the usage of others, and each has learned the art of intimating by such signs the internal acts of his mind. Mutual intelligibility, we have seen, is the only quality which makes the unity of a spoken tongue; the necessity of mutual intelligibility is the only force that keeps it one; and the desire of mutual intelligibility is the impulse which called out (?) speech. Man speaks then primarily, not in order to think, but in order to [express?] impart his thought. His social needs, his social instincts, force him to expression. A solitary man would never frame a language. * * * It is a well-known fact that children who are deprived of hearing, even at the age of four or five years, after they have learned to speak readily and well, and who are thus cut off from vocal communication with those about them, usually forget all they had learned, and become as mute as if they had never acquired the power of clothing their thoughts in words. *The internal impulse to expression is there*, but it is impotent to develop itself and produce speech; exclusion from the ordinary intercourse of man with man not only thwarts its progress, but renders it unable to maintain itself upon the stage at which it had already arrived." W. D. Whitney, Language and the Study of Language, pp. 404, 405.

This passage occurs in connection with a criticism of the theory advocated by Max Müller (for which see the preceding note), and Prof. Whitney evidently regards the two theories as irreconcileable. But with a few slight modifications of expression, such as I have indicated above, there seems to be no reason why the two may not be held together. Prof. Whitney himself recognizes the existence of an "internal impulse to expression" even in the case of a deaf-mute, who has no power of imparting his thought to others by the usual mode of utterance. On the other hand, no disciple of Müller certainly could claim that the internal impulse or instinct could ever produce a developed language without the presence of another person to be spoken to, and the conscious desire on the speaker's part to produce a definite impression on the hearer's mind. The difference in the two theories seems to consist chiefly in the fact that each dwells upon a different factor in the complex process by which a language is evolved. Dr. Lieber, though only touching incidentally upon these points in the pursuit of his main object, clearly recognizes the existence of both factors. — Ed.

tory of the agreement as the party who originated them. Forced silence, or the impossibility of expressing dissent, is, of course, not comprehended within the term "tacit assent."

The ancient rule in law, therefore, that *qui tacet consentire videtur*, (he who keeps silent is regarded as consenting,) is correct, provided we give the proper meaning to the term *videtur*. It has been justly amplified thus: "He who remains silent and inactive, when he has power and is under obligation to object or resist, is regarded as assenting." * If a person is deceived, his silence is of course not consent, nor is it such if he that has power first prohibits all contradiction, and afterwards construes silence into assent, a case which has repeatedly occurred in history.

V. All the signs enumerated above require interpretation; that is, it is necessary for him, for whose benefit they are intended, to find out what those persons who used the sign intend to convey to the mind of the beholder or hearer. Thus, some beacons signify to the approaching mariner that there is great danger in their vicinity; others indicate, by their guiding light, the safest passage into a port. If the mariner does not know how to interpret these signs, he will attach a wrong meaning to them, or be at a loss what meaning they have. Thus, likewise, have the historian and antiquarian to interpret inscriptions on medals, and not only the words they may contain, but also certain emblems, representations of animals or things. Some pictures must

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* "Qui tacet verbo et facto, ubi obloqui vel resistere potest ac debet, consentire videtur." Krug, Professor of Philosophy in the University at Leipzig, in his Philosophy of Law, (Rechtslehre.)

be likewise interpreted, for instance, those which are found on the walls of Egyptian temples; that is to say, it is one of the occupations of the historian and antiquarian to find out the meaning of these various representations, *i.e.* the ideas which he who made them (or ordered them to be made) intended to convey to the beholder.

If we believe that one of the objects of God, in creating the world, was to manifest His wisdom and goodness to man, the expression of interpreting nature is correct. By interpreting the actions of a man,* we mean to designate the endeavor to arrive at their direct meaning, the motives from which they flowed; by construing his actions, we rather indicate an endeavor of arriving at conclusions with reference to the whole character of the individual acting, or at least at something which lies beyond the nearest motives of the specific acts in question. This agrees substantially with the difference between interpretation and construction which will appear in the course of this work.†

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* To *explain* and *interpret*, are not confined to what is written or said; they are employed likewise with regard to the actions of men. Crabb Eng. Syn., ad verb. *Explain.*

† It is always well to have every thing as clear around us as possible; it gives light and imparts vigor to the mind, if we see the Whence and the Whither of things, and trace connection where insulation seems to exist, even though it be in matters apparently trifling. I hope to be pardoned, therefore, by the strictly practical Lawyer, if I dwell for a moment on the origin of the word which claims our attention for the present, in a sphere very different from that of Law. To Interpret, as is well known, is derived from the Latin *interpres*, *interpretari*, a compound of *inter* and *pretari.* The latter belongs, as nearly all truly Latin words, according to its root, to that language which was spoken by the original inhabitants or settlers of Europe, and of which the Gothic, ancient High German, Swed

VI. The idea, involved in the term Interpretation, that we have to discover the true meaning of signs, and represent it to others, implies, likewise, that we proceed in doing so on safe ground, according to rules established by reason, and not arbitrarily or whimsically. On this account, interpretation, and, as will be seen in the sequel, construction, are distinct from conjecture. Still it lies in the nature of things, that, in some cases, they approach to each other.

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ish, Icelandic, Latin, etc., are but descended, and which was likewise either the first foundation of the Greek, or so strongly influenced it, that the root of innumerable words is easily traced through all these languages. The many profound inquiries of European philologists have brought so many facts to light, that this connection may be considered as firmly established, while historic inquiries have shown the vast population of Italy long before any records of the Romans began. *Pretari* is of the same root with many words in Teutonic languages; *prata* in Swedish is speaking; we have *prating* and *prattling;* the German *reden,* (pronounced *raden,*) speaking, is the same, for *d* and *t* easily change, while a consonant before another (*P* in this case) is frequently dropped, or it may be that *reden* is the original. *Präten* signifies, to this day, in some parts of Germany, speaking loud and monotonously. *Prædicare* and the Greek *φράζειν* belong to the same family of words. It is very possible that *pretari* and *prating* are of the same root with *broad*, German *breit*, speak broadly, plainly. The present German word for interpreting is *auslegen*, laying out, laying open, unfolding.[3]

[3] Upon the meaning of *interpretatio*, as used by the Roman classical jurists, see Additional Note F, in Appendix. Upon the force of the German word *auslegen*, mentioned at the end of the author's note, Savigny remarks as follows: "The term *Auslegung* [which is the noun relating to the infinitive *auslegen*, as *interpretation* to the verb *to interpret*], equivalent to the Latin *explicatio*, is peculiarly adapted to express the aim of the process of interpretation, which is to evolve from the rule interpreted every possible legal truth that is contained therein. For the term implies that whatever is contained and, so to speak, wrapped up in the language of the rule is unfolded and brought to light, and thus made known. The term *Erklärung*, on the other hand [used by other German writers to designate the same process, and literally signifying a *making clear*], rather implies that an accidental obscurity is done away with, darkness changed into light; and, therefore, is less significant of the true nature of the province of interpretation." System des heutigen R. R., I. 216 n. (c).—ED.

Conjecture is vague, interpretation is distinct; but in proportion as that, which is to be interpreted, affords less opportunity for the application of the rules established for interpretation, the latter approaches to conjecture; provided we have not to apply construction.

VII. Those signs by which man most frequently endeavors to convey his ideas to another, and by which, in most cases, he best succeeds in conveying them, are words.

Words are articulate sounds, or the representation of them on or in some material by certain adopted characters, to which, single or combined, we attach certain fixed ideas. The idea or notion thus attached to any word is called its signification; the general idea, or the assemblage of ideas or notions, conveyed by several words grammatically connected together, is called the sense or meaning of the words or period. The true sense or meaning is that which they ought to convey.

It is clear, therefore, that the term "true sense," in its most comprehensive adaptation, may signify different things, according to the different object we have in view. Thus a teacher will say to his pupil, who has unskilfully expressed himself: "You meant to say such a thing, but the true meaning of your period is quite a different one; that is, the meaning which your words express, according to their signification and the rules of combining them universally adopted, is different from what you intended to say." The teacher is right in calling the true sense that which the words express according to the general rules, for his object is to teach the pupil how to convey his ideas correctly and perspicuously, to make use, therefore, of the words accord-

ing to rules generally adopted, without which there would be no such thing as understanding one another among men. The case changes, however, when the object of the speaker or writer is not to learn the use of words, but simply to convey certain ideas. True sense is in this case the meaning which the person or persons, who made use of the words, intended to convey to others, whether he used them correctly, skilfully, logically or not.

Understanding or comprehending a speaker or something written means attaching the same signification or sense to the words which the speaker or writer intended to convey.

VIII. Inasmuch, therefore, as the term Interpretation is applied to words used as the common means of converse or communion among men, we define it thus: —

Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey. It was this latter which was meant by the word "representation" in section IV. of this chapter.

Sometimes interpretation signifies, likewise, the art which teaches us the principles according to which we ought to proceed in order to find the true sense.* This art or science,

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* See Prolegomena iii. in Ernesti, Institutio Interpretis, p. 6, Vol. I., in the translation of Mr. Terrot, Vol. I. of the Biblical Cabinet, Edinburgh, 1832.[4]

[4] In the American edition of Ernesti, translated by Prof. Moses Stuart (as to which see Additional Note A, Bibliography of Interpretation), the passage is Introduction, § 3, p. 14, and reads as follows: —

The art of interpretation is the art of teaching what is the meaning of another's language; or that skill which enables us to attach to another's language the same meaning that the author himself attached to it. — Ed.

however, is better called the principles of interpretation, or, which is preferable to either, Hermeneutics, of which more will be said hereafter.

In law and politics we have to deal so little with the interpretation of any other signs than words, that the term Interpretation, if used without any additional expression, means always the interpretation of words.

For the sake of brevity, the term Text will be used, to designate the word or words, or discourse to be interpreted or construed, or the whole writing in which they are contained. The term Utterer may be used for the author of the words to be interpreted, whether he uttered them in writing or orally.[5]

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[5] See Additional Note C, on the Province of Legal Hermeneutics. — Ed.

CHAPTER II.

Ambiguity of Human Speech — Processes of Formation of Words — Necessity of always leaving much to be understood by Interpretation — Not to be avoided by Specification and Amplification — Causes of Ambiguity in the Language, the Utterer, the Change of Circumstances — Desire of avoiding different Interpretation — Prohibition of Commentaries — Napoleon's View — Interpretation cannot be dispensed with — Civil Liberty demands Independence of the Judiciary, of the Law — Correct Interpretation more necessary in free Countries than in States not free.

I. If Interpretation is the discovery of the true sense of words, it is presumed that this sense is not obvious; for, that which must be discovered or found out must needs be hidden, in some way or other, before it is discovered. Yet words signify ideas or things, and how does it happen that, if used for the very purpose of conveying our ideas, they can leave any doubt?

The ambiguity of human speech is owing to a vast variety of causes, at times intentional, at others unintentional, avoidable or unavoidable, owing to the utterer, to the words or the situation of things and their changes. The most common or most important causes will be given here, and it is necessary to weigh them well, since many errors in the highest spheres of politics and law have arisen from an insufficient consideration of these causes, and a consequent belief, which still manifests itself not unfrequently in many, that ambiguity can be entirely avoided, or that certain instruments of the gravest import do not admit of any doubt, and, consequently, do not require interpretation.

II. In no case are words, originally, produced in a finished state by the reflecting intellect, and consciously affixed to objects, presenting themselves to the mind in their clearly defined state, but on the contrary, things, actions, in short, phenomena, present themselves as a whole,[1] with a number of adjuncts, a mass of adhesion, and words become in the course of time only, enlarged in their meaning to more generic terms, or a prominent quality strikes so manifestly the human mind, that it alone urges to utterance, which in course of time only becomes more restricted to specific objects. As, however, these processes are going on at the same time, with many people, subject indeed to the same general laws, but not being under the same specific influences, the natural consequence is, that terms receive a meaning, distinct indeed as to some points, but indistinct as to others, or, to use a simile, they may be distinct as to the central point of the space they cover, but

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[1] It requires but a slight acquaintance with comparative philology to enable us to perceive that words, for the most part, do not represent distinct thoughts, but only the parts into which a thought or conception has been divided by an analytic process. This is especially true of modern languages, which differ from their mother-tongues, classic or barbaric, chiefly in the extent to which this process of analysis has been carried. No mistake has been productive of more confusion, or has been more frequently taken advantage of for the purposes of deceit and fallacy than the oversight of this truth, — the assumption that each word in a sentence must have a clear and complete meaning, independent of the connection in which it stands. It is still as true as ever that the sentence, the clause, the proposition, are the units of thought, and must be interpreted as units, however far language may have gone in the process of expressing the different modifications of the central thought by adjuncts and auxiliaries, instead of case endings, and the like. Sir William Hamilton has pointed this out with his usual clearness and felicity: —

"You are not to suppose that the mental sentence which must be analyzed, in order to be expressed in language, has so many parts in consciousness as it has words, or clauses, in speech; for it forms one organic and indivisible whole. To repeat an illustration I have already given, the parts of an act of thought stand in the same relation to each other as the parts of a triangle, — a figure which we cannot resolve into any simpler figure, but whose sides and angles we may consider apart, and, therefore, as parts; though these are in reality inseparable, being the necessary conditions of each other." Sir W. Hamilton, Eighth Lecture on Logic, vol. III., p. 133. — Ed.

become less so the farther we remove from that centre, somewhat like certain territories of civilized people bordering on wild regions. This, then, would be a necessary cause of ambiguity, even if the nature of things and ideas itself were not such that mathematical precision becomes impossible, except in mathematics themselves.[2] Absolute language, by which is meant language which absolutely expresses all that which is to be expressed, neither more nor less, for every mind, is possible in mathematics only; and mathematics move within a narrow circle of ideas. It

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[2] *Mathematical language.* It may be questioned whether even mathematical terms do not constitute an apparent rather than a real exception to the rule that all language requires interpretation. The simplicity and exactness of the notions represented by such terms do, indeed, make formal interpretation superfluous whenever they are used with scientific accuracy in the operations of the science to which they belong. The notion of a straight line, of a triangle, of a circle, of the number three, or thirty, or three millions, is so precise and so narrowly limited, that no mental operation can possibly increase its clearness to one who has once correctly grasped it; nor could any such operation give even an approximate notion of it to one who has not so grasped it already, — *e.g.*, to a child, or (in the case of the higher numbers at least) to a savage. Still, if hermeneutics be the science by which we ascertain the meaning of all signs, — at least, of all words, — as Dr. Lieber has certainly shown in the text of this work, then the mental process by which we represent to our own consciousness the meaning of such exact terms is as truly a process of interpretation as the construction of the most difficult law; as truly such in kind, though there may be a very wide difference in degree. In the remark in the text (which is repeated once or twice in different parts of the volume), and in a few other passages, Dr. Lieber seems, indeed, to have written under the unconscious influence of the older doctrine, which he himself has done so much to disprove, — the doctrine that interpretation was applicable only to obscure or imperfect texts, and that a complete and perfect expression of thought by signs would require no interpretation. Had his attention been drawn to the point, he would no doubt have been ready to admit that his exception of mathematical terms was inconsistent with his main doctrine, and that such terms, though involving practically the least conceivable amount of interpretation, do still in theory involve it. However this may be as an abstract question, or when mathematical terms are used in the operations of pure science, there can be no doubt that such terms, when used in law, often require interpretation or construction, and are as capable of having their meaning modified by these processes as any others. Thus, numbers, the simplest, most abstract, and most generally understood of all terms among civilized men, are sometimes construed to mean something very different from their mathematical value. A familiar example is found in the case of *Smith* v. *Wilson*, 3 Barn. & Adol. 728, where a "thousand" (rabbits) was held to mean twelve hundred when used in a lease. So, "twenty-one" (years of age) was construed to mean eighteen, when another statute had changed the period of majority from the former to the latter age. *Slater* v. *Cave*, 3 Ohio St. 80. — Ed.

matters not who uses language; absolute language is impossible, so soon as human words are used, be the speaker inspired or uninspired.*

III. Were we desirous, therefore, of avoiding every possible doubt, as to what we say, even in the most common concerns of our daily life, even if we pronounce so simple a sentence as "give me some bread," endless explanations and specifications would be necessary; but in far the greater number of cases, the difficulties would only increase, since one specification would require another. To be brief, the very nature and essence of human language, being, as we have seen, not a direct communion of minds, but a communion by intermediate signs only, renders a total exclusion of every imaginable misapprehension, in most cases, absolutely impossible.

There are some nursery stories representing, to the great amusement of the little ones, people who are prompted by a pedantic anxiety to speak with absolute clearness, and only entangle themselves in endless explanations, one upon the other, until the whole story ends with an utter inability of the pedant to ask for the commonest thing, and he dies of hunger. These stories are founded upon the principles touched upon above, and, though but nursery tales, they contain a truth which for a long time was little acknowledged in the drawing up of laws, wherein, it was believed, explanation and specification, piled upon explanation, would

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* The reader will find much that is serviceable for the understanding of this topic in Archbishop Whateley's Logic, especially in the second half of that brief work.

produce greater and greater clearness, while in fact they produced greater and greater obscurity.[3]

IV. Let us take an instance of the simplest kind, to show in what degree we are continually obliged to resort to interpretation. By and by we shall find that the same rules which common sense teaches every one to use, in

[3] As an illustration of the vanity of attempting, by a mere multiplication of words and phrases, to obtain precision, we may take the following extract from the finding of a coroner's inquest upon the body of a fireman killed June 14, 1838, by the explosion of the boiler of the steamer Victoria, on the river Thames. Omitting the formal commencement, we quote only the *facts*:—

* * * "On the 14th day of June, in the year aforesaid, in the parish aforesaid, in the county aforesaid, the said Andrew Brown, being on board of a certain steamboat called the Victoria, which was then and there floating and being navigated on the water of a certain river called the river Thames, it so happened that accidentally, casually, and by misfortune, a certain boiler, containing water, and then and there forming part of a certain steam-engine, in and on board of said steamboat, and attached thereto, and which said boiler was then and there used and employed in the working of the said steam-engine, for the purpose of propelling the said steamboat in and along the said river, and was then and there heated by means of a fire, then and there also forming part of the said steam-engine, in the said steamboat, burst and exploded, and then and there became derupt and broken, whereby and by means whereof a large quantity, to wit, ten gallons of the boiling and scalding water and steam, then and there being within the cavity of the said boiler, and a large quantity, to wit, half a bushel of hot and burning cinders and coals, forming part of the said fire, the said boiling and scalding water and steam, and the said cinders and coals, being then and there used and employed in the working of the said steam-engine, accidentally, casually, and by misfortune, were cast, thrown, and came from and out of the said boiler and steam-engine with great force and violence to, upon and against the face, hands * * * of him, the said A. B.; whereby he, the said A. B., then and there, received in and upon his face * * * one mortal shock and concussion, and divers mortal scalds and burns, and thereby became mortally shaken, scalded, and burned; of which said mortal shock and concussion, and of which said mortal scalds and burns, he, the said Andrew Brown, at the parish aforesaid, in the county aforesaid, instantly died. And so the jurors [names] do say that he, the said A. B., in manner and by the means aforesaid, accidentally, casually, and by misfortune, came to his death, and not otherwise."

It is interesting to find that all this verbiage did not sufficiently describe the circumstances for the purposes of the law. The court held that there were two defects in the finding, which, though technical in their nature, must be held fatal, according to the known rules of pleading. *First*, there was no time stated for the explosion of the boiler. On the authority of Colton's case, Cro. Eliz. 738, it was held that the date with which our extract begins only fixed the time when A. B. was on board the steamer; but the law could not assume that that was the day of the explosion! *Second*, the time of A. B.'s death was not given. If it had been said that "he *then* died," it would have answered; but *instantly*, in its "more natural and usual sense, is instantly *after*," it may be the next day! Such was Lord Denman's opinion and that of the whole Court of Queen's Bench. Regina *v.* Brownlow, 11 Ad. & E. 119–126 (1839). — Ed.

order to understand his neighbor in the most trivial intercourse, are necessary likewise, although not sufficient, for the interpretation of documents or texts of the highest importance, constitutions as well as treaties between the greatest nations.

Suppose a housekeeper says to a domestic: "fetch some soupmeat," accompanying the act with giving some money to the latter; he will be unable to execute the order without interpretation, however easy and, consequently, rapid the performance of the process may be. Common sense and good faith tell the domestic, that the housekeeper's meaning was this: 1. He should go immediately, or as soon as his other occupations are finished; or, if he be directed to do so in the evening, that he should go the next day at the *usual* hour; 2. that the money handed him by the housekeeper is intended to pay for the meat thus ordered, and not as a present to him; 3. that he should buy such meat and of such parts of the animal, as, to his knowledge, has commonly been used in the house he stays at, for making soups; 4. that he buy the best meat he can obtain, for a fair price; 5. that he go to that butcher who usually provides the family, with whom the domestic resides, with meat, or to some convenient stall, and not to any unnecessarily distant place; 6. that he return the rest of the money; 7. that he bring home the meat in good faith, neither adding any thing disagreeable nor injurious; 8. that he fetch the meat for the use of the family and not for himself. Suppose, on the other hand, the housekeeper, afraid of being misunderstood, had mentioned these eight specifications, she would not have obtained her object, if it were to exclude all *possibility* of misunderstanding. For, the various speci-

fications would have required new ones. Where would be the end? We are constrained then, always, to leave a considerable part of our meaning to be found out by interpretation, which, in many cases must necessarily cause greater or less obscurity with regard to the exact meaning, which our words were intended to convey.*

Experience is a plant growing as slowly as confidence, which Chatham said increased so tardily. In fact, confidence grows slowly because it depends upon experience. The British spirit of civil liberty induced the English judges to adhere strictly to the law, to its exact expressions. This again induced the law-makers to be, in their phraseology, as explicit and minute as possible, which causes such a tautology and endless repetition in the statutes of that country that even so eminent a statesman as Sir Robert Peel declared, in parliament, that he "contemplates no task with so much distaste as the reading through an ordinary act of parliament." Men have at length found out that little or nothing is gained by attempting to speak with absolute clearness and endless specifications, but that human speech is the clearer, the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words. However minutely we may define, somewhere we needs must trust at last to com-

* This truth, appearing, thus stated, as a mere truism, was nevertheless greatly forgotten during an entire period of our struggling race, and it was a great step which Des Cartes made, after the period of scholastic philosophy, when he declared that there was no use in attempting to define the last terms and those words which every one understands. Locke repeated Des Cartes's saying, but we fear carried its application much too far. In this as in all other spheres, it is necessary yet difficult to observe the just mean.

mon sense and good faith. The words of Sir Robert Peel, introductory to his bill for amending the penal code of Great Britain, are too valuable not to find a place here. He said in the House of Commons: —

"I certainly have set the example to the house, of drawing up such bills for the future in an intelligible manner. Not being myself a lawyer, and possessing, of course, no technical knowledge, I do confess, sir, that there is no task which I contemplate with so much distaste, as the reading through an ordinary act of parliament. In the first place, the long recapitulations, the tedious references, the constant repetitions, the providing or designating offences and punishments for the specific case of men, women and children, and for every degree and relation in society, and the necessity of indicating these several personages and matters by as many appropriate relations and designations — then the confusion resulting from the attempt to describe, and constantly referring to many different descriptions of property. Really, sir, all these various repetitions, recapitulations, and references are so tedious and so perplexing, that I, for one, almost invariably find myself completely puzzled before I get to the end of a single clause. The mode I have adopted in this bill, to obviate all this confusion and uncertainty [we see, then, that the attempt at being absolutely distinct leads to greater uncertainty instead of certainty], does seem to me, I speak it with submission, much more eligible and precise, than the usual phraseology adopted in these acts, and might, I cannot help thinking, be pursued with advantage in bills which may be brought in hereafter." ——— "Owing to the various lights in which I have considered this provision, and the extent which I have thus given to the bill, I am afraid it will be

impossible to frame one more comprehensive." So far Sir Robert.*

The fact is that several causes, and among these the spirit of liberty and its concomitant desire of having a government of law, had induced the English to aim at perfect or absolute perspicuity in their laws, even to the exclusion of interpretation by common sense, which is a matter of impossibility.†

The full and redundant phraseology of Mr. Burke's will, by which he wished to pass his property to his wife and her

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* To the testimony of Sir Robert Peel we may add that of Lord John Russell. When he was prime minister, he stated (March, 1851) in the Commons, on his bill creating additional chancery judges, that "it does not require so high an officer to superintend bills, and see that their language is concise and correct; moreover, I must say, that I never perceived the great lawyers in Parliament, with all their acuteness in the prosecution of reform in the law, so clever, when they come to put their views into shape as the practical men whose official business it is to prepare and revise the measures, that are brought before parliament — as for example, Mr. Gregson, who assisted in the preparation of the Reform Bill, or as the present most able parliamentary assistant of the Government, Mr. Cowlson."

† This induced the English, at an early period to abate the evil of prolixity. Lord Keeper Coventry (who died 1679) made several ordinances against prolixity of bills, answers, replications, etc. — "an evil," says Lord Campbell, now (1860) Lord Chancellor "which will last while the remuneration of the lawyers is regulated by the length of the written proceedings." Lives of the Chancellors, vol. II., p. 540. Yet the difficulty of framing a law, which, any day, may become a rule by which we have to decide for or against a man, is strikingly exemplified by the fact that Lord Loughborough (Mr. Wedderburn) after having been Lord Chancellor, drew up a law against young men of fortune granting annuities in their minority to the ruin of their fortunes. The act was repealed on account of inaccuracy of wording, and the repealing statute has been explained by three subsequent acts, "and even yet stands in need of further revision." Lives of Eminent Judges by Lord Campbell, London, 1846, vol. I., p. 221.

heirs, with the codicil of July 30, 1795, is another instance of the fact that we do not arrive at great perspicuity by going beyond a certain limit; and this limit is, where plain common sense must begin to interpret, that is, where we must begin to give to words that meaning, which, according to plain common sense, they ought to have.

The more we strive in a document to go beyond plain clearness and perspicuity, the more we do increase, in fact, the chances of sinister interpretation.

V. Words themselves, as was indicated, may have an ambiguous signification; this arises from different causes.

1. The objects of the physical world are not so distinctly defined from each other as they appear to be at first glance. Innumerable transitions exist between them. To this day, no naturalist has yet succeeded in giving an entirely satisfactory definition of the word plant, which, as every true definition ought to do, includes the signs characteristic of all individual specimens called Plants, and extends no farther, or absolutely excludes every thing else. The lawgivers of all countries have found it a difficult task to give an exact legal definition of the word Arms, and one still more difficult, to define the terms defensive and offensive arms. In a criminal lawsuit one credible witness testified that he had seen a bench in a certain room covered with blood; another, equally credible, stated upon oath that he had seen, in the same room, a table and no bench, soiled with blood. The fact was, that the object sworn to was, considered as a bench, unusually high and wide; considered as a table, low and narrow.

2. Ideas relating to the invisible world flow still more one into another; not always from want of words, but fre-

quently on account of the gradual transitions from one extreme to another. Even sensations are not absolutely divided by a line of demarcation; the highest delight borders on pain.

3. Words themselves mean different things, sometimes more, sometimes less connected with each other; or they do not signify the thing, or idea to be named, with sufficient precision. This is owing, among other reasons, to the fact, that most words expressive either of abstract ideas, or subjects belonging to the invisible world, are faded tropes, that is, words meaning originally objects of the sensible world, but which are now applied to the intellectual. In many cases, therefore, different people do not connect exactly the same ideas with the same words, although they may be used everywhere.

4. Words may have a distinct meaning and be used with clearness at the time, but the class of things to which they relate may change. It may be perfectly distinct to use the word Dagger, at a certain period, but the subsequent introduction of large clasp knives makes the term less distinct. The relation of things changes after the word has been formed and used, which necessarily affects the meaning. The term Highway is used in ancient laws, before the invention of railways. Are they highways? * [4]

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* New inventions, customs, new branching out of ideas, the progress of civilization expand and contract the meaning of words. If it were not so, language would not be a fit means of communication, nor could it last as a whole from generation to generation. Few things are more interesting than the history of important words, and the variety of meanings they assume; but all this implies ambiguity at certain periods and for certain words.

[4] The question proposed by the author has been answered directly, and in the negative, by the following case: "A railroad is not a 'highway' in the sense of that

5. A similar remark applies to terms designating ideas. No word has claimed more attention than the term Sovereignty,[5] within the last century and a half. Yet its meaning has all the time been changing or has hardly ever been used with any definiteness, although always on highly important occasions.

VI. The person, who endeavors to convey some meaning to us, may not use the proper means.

1. He may be illiterate and not use the words in their most proper or generally adopted meaning.

2. He may not be sufficiently trained in grammar and syntax, to know the different signification and effect which a word acquires by a different position.

3. He may speak or write on the spur of the moment, or in great excitement, and not be able to select those means of conveying his ideas, which calm deliberation would have suggested.

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word as used in the North Carolina Revised Code, chap. 34, § 2, punishing with death robbery in or near a highway." The State *v.* Johnson, Phill. L. 140. But, for most purposes, railways no donbt are highways. See an article in American Law Register (o. s.), vol. VIII., p. 138, "Are Railroads Highways?" That railways are but improved highways, and are of such public use as to justify the exercise of the right of eminent domain by the sovereign in their construction, is now almost universally conceded. 1 Redf. on Rys. 229, note. The authorities to this point are too familiar to need citation. But it does not follow that the two terms are synonymous in other applications. This is shown by the many decisions that the construction of a railway upon the surface of a highway is a new use, or appropriation of the soil, and entitles the owner of the fee to additional compensation. Cox *v.* Louisville, etc., R. Co., 48 Ind. 178. There are many other cases to this point, and almost as many *contra;* but the very existence of the question shows that the word highway cannot be interpreted to include railway in all cases, *i.e.*, that the question suggested in the text does not admit of a categorical answer. In the article in the American Law Register, vol. VIII. (o. s.), pp. 138, 259, the question, "Are Railroads Highways?" is discussed, and the following conclusions reached: I. A railroad corporation has a legal estate in the soil of the road. 2. That estate is subject to the public easement. 3. The corporation is intrusted with the care and direction of the easement. In support of the doctrine that they are highways, are cited King *v.* Severn & Wye R. Co., 2 Barn. & Ald. 646; Bonaparte *v.* Camden & Amboy R. Co., 1 Baldw. C. Ct. 205; Railroad Co. *v.* Chappell, Rice (So. Car.), 383. *Contra*, 5 Ired. L. 307; 9 Smed. & M. 431. — ED.

[5] See Additional Note D, on the term Sovereignty. — ED.

4. He may be sick or dying, and not be as fully master of the means of expression, as he was in a healthy state. This is not unfrequently the case with regard to wills, dictated in haste, or merely pronounced in the presence of witnesses, which oral wills are valid in some countries with certain restrictions, and are known to the common law as nuncupative wills.

VII. We may not be fully acquainted with the precise meaning, which the members of a certain sect, profession or trade, or the inhabitants of certain parts of a country may attach, or which at certain periods of history may have been attached, to certain terms. Or it may have become necessary to apply established words to new ideas, as was the case with many Greek words when used by Paul, or other early Christians; or as is the case with the word Travelling since the invention of steam cars. Some commentators say travelling includes travelling by land or water, on foot, on any animal, or drawn or supported by any animal. The word travelling, therefore, if used in a law, for instance, in a penal law, which provides peculiar protection for travellers, may require interpretation since the introduction of travelling by steam. The counsel of a prisoner charged with a crime on the highway might argue, that severer penalties are inflicted for crimes of this class only on account of the traveller's distance from people who might assist him, as would be the case in a populous place, but that on railroads, a large number of people always travel together, and hence the law need not afford additional protection, which in this case being greater severity, ought not to be fur-

nished. Indeed, it might be of very great importance, and yet not so easy to determine, because the life of an individual may depend upon it, whether railroads are highways in the meaning of the penal law.[6]

There are many words used by some religious sects or communities in America, in a manner in which they are not common with the community at large. Other words again have not acquired with the people themselves a perfectly definite meaning. Not long ago, an individual in in New England left a legacy for the benefit of the poor of his place, but only to those poor who are of "the household of faith." See John Pickering's Lecture on the alleged Uncertainty of the Law, Boston, 1834. This expression has either not acquired a very definite meaning with the people, who use it; or if it have, those who do not use it by way of sectarian terminology are unable to connect an idea with it, so clear as to allow of legal action.[7]

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[6] See preceding note (4). — Ed.

[7] In Gass's Appeal, 73 Pa. St. 39, 13 Am. 726 (1873), the meaning of the term "divine service" (or, in the German original of the contract, *Gottesdienst*) was in question, and it was held not to include a Sunday-school. Two congregations, one of the German Reformed, and one of the Evangelical Lutheran Church, had united in building a church for their common use. They had also, for a time, had a union Sunday-school in a school-house near by. Afterward the Lutherans withdrew from this, and established a Sunday-school of their own in the church, in opposition, and without the consent of the Reformed congregation. Upon a bill filed by the latter to enjoin them from using the church for that purpose, the court held that, as Sunday-schools were not in existence or thought of in the neighborhood, when the agreement was made, the injunction should be granted.

"It is the duty of courts to interpret the language of written instruments; but, in doing this, they always follow the meaning attributed to the terms by those whose custom it is to use them. Therefore, when a contract is capable of two different interpretations, that which the parties themselves have always put upon it, and acted upon, especially as here, for a long series of years, a court will follow, because it is the true intent and meaning of the parties which are to be sought for in the language they use. However right it may be to view the Sunday-school as a most useful institution, in instructing youth in the knowledge and worship of God and their duties to mankind, this praiseworthy view cannot change a written

VIII. We may not be fully acquainted with the language in which something is written, with the precise bearing or shade of meaning which certain words have in a foreign idiom or had in that language, at a particular period, or with a particular author.

The person who speaks or writes may not be decidedly clear himself on what he speaks or writes; he may not be fully master of the subject. His ideas, therefore, may yet be vacillating, so that the different parts of what he utters are not strictly consistent with one another.

It may be the intention of the speaker or writer not to speak plainly, from kindness, fear, cunning, malice, caution, as in times of war or revolution, or any other motive. He may be desirous of leaving to him, whom he addresses, a choice of means or actions; or he may purposely express himself vaguely, so that at some future period he may be at liberty to resort to one or the other meaning, according to convenience or interest.

IX. Decorum, especially, may be the reason for not expressing ourselves so plainly, as a knowledge of the subject and mastery of the language would otherwise enable us to do.*

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* Thus the Prussian Code, Vol. ii. Tit. xx. 1069, says: —

—— "And other unnatural sins of a similar kind, which cannot be

contract. We cannot engraft on a contract for one thing an agreement for a different thing, though the fruit of the scion be even better than that of the natural stock.

"These congregations never so understood or acted upon their agreement of union. They built their church for divine worship, by prayer, praise, and the preaching of God's word. Its use was to be *congregational worship*, not school instruction. Their worship was to be led by *pastors*, who should regulate their appointments in due regard to mutual harmony, and was not to be the instruction of youth, even though part of it were in divine things, led by *individual laymen*. There are reasons, also, why a chamber or audience-room dedicated to public congregational worship, should not be thrown open to thoughtless, giddy, sometimes vicious youths, to deface and soil it." — ED.

X. It may be the object of the utterer, to clothe the true sense in various tropes, in metaphors, allegories, as poets frequently do. Or it may not be possible to express what we wish to say, in any better way, than by an approximation to it, by way of tropes or other figurative language.

The speaker or writer may, purposely or involuntarily, use such words as would express far more than his calm and settled opinion, were they to be taken literally, or were not great deduction to be made from them.

We may be but imperfectly or not at all acquainted with the subject, to which the words of the discourse relate, for instance to customs, persons or events of nations removed from us at a great distance either by space or time.

The speaker or writer may not have the opportunity of acquiring a perfect knowledge of the subject he treats of, as was the case with many ancient grants.

If a text is obscure from the loss or interpolation of certain passages, it is not by interpretation that we can remedy the evil, as will appear from the definition which has been given.

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mentioned here on account of their vileness, demand an utter extinction of their memory." That the reader may not misunderstand the expression "utter extinction," I will add that the criminal, besides his other punishment, is banished forever from the place of his former residence, where his crime has become known.

Pope Innocent III., writing against the abominable and indecent swearing in France in the thirteenth century, and threatening his displeasure, says in his letter: "they utter things in their oaths which we cannot mention." Innocentii III. Epistolæ, Balusii ed., Tom. II. p. 735.

In the Laws of Menu, son of Brahma, translated by Sir William Jones, is this passage: "except those whose crimes are not fit to be named." Paragraph 275 in the Laws &c. p. 41, vol. 8, of Sir William Jones's works, London, 1807.

XI. It appears, then, from the foregoing remarks, that obscurity of sense may arise, from a want of knowledge of the subject either in the speaker or hearer, the writer or reader; or from an imperfect knowledge of the means of communication, again, either in the speaker or writer, on the one hand, or the hearer or reader on the other. And farther, that interpretation of some sort or other is always requisite, whenever human language is used; because no absolute language, by which is meant that mode of expression which absolutely says all and every thing to be said and absolutely excludes every thing else, is possible, except in one branch of human knowledge, namely, mathematics.[8] Owing to the peculiar character of this science, its terms express the precise idea to be expressed, neither more nor less. Its language is always sufficient for the subject it treats of, because it proceeds in inventing, and has to do with the understanding alone, but not with the subjects of real life, nor with the feelings, the nobler reasoning powers, the many interests and motives of man, the lowness or the elevation of the human soul, and their thousand intricate ramifications.

If it is certain that interpretation of some sort or other cannot be dispensed with, wherever human language is used, except in mathematics, the necessary consequence will be, that we have to ascertain the principles of true and safe interpretation. Important as it is in all spheres of human activity or knowledge, it is peculiarly so where written rules of action are given, as in religious, moral, or political codes, laws, wills, contracts, and treaties, or

[8] See note (2), *ante*, p. 15.

when works or documents of distant tribes or by-gone ages lie before us; that is, in history and philology

XII. It has not escaped the observation of the lawgivers of different nations, that owing to the different interpretation, put upon the same laws, much vexation and trouble arise. In fact, the "uncertainty of the law," which originates in a great measure from the different interpretation to which one and the same law may be subject, has become proverbial. It has been, therefore, the anxious desire of several well-disposed legislators to avoid interpretation and consequent commentaries, by framing codes of law which should be so complete and exact as to render interpretation superfluous. To diminish litigation, and to make lawyers comparatively useless, was one of the objects of the Prussian code, promulgated by Frederic the Great. Napoleon said, according to the Mémorial de St. Hélene, by Las Casas, that he once entertained the idea that all principles of law might be reduced to a few concise forms, which ought to be combined according to fixed rules, similar to those of mathematics; and that thus simplicity and certainty of law might be established. He soon, however, gave up the idea, when he came to discuss the various parts of the French civil code with the other members of the committee appointed to draw up that work. In Bavaria, commentaries on the penal code are actually prohibited. With true wisdom did the government of that country officially publish the motives, explanations, &c., which were given in the course of the discussions in the king's privy council, for adopting the various laws. They have been drawn up and reduced to a systematic whole, published in

three volumes, Munich, 1813 and 1814. But it was not equally wise to prohibit commentaries; for those who advised the king so to do, forgot, that as they felt bound to explain the various provisions of the code, so would their own explanations again carry along with them the necessity of interpretation, simply because drawn up in human language, though we willingly allow, not in the same degree with the briefer code. No code can possibly provide for all specific cases, which generally consist of a combination of simple elements; nearly every case in reality is a complex one, because the various relations of men are forever changing.

This remarkable prohibition of commentaries in Bavaria, is to be found in the royal mandate of October 19, 1813, by Maximilian Joseph, to all the courts of appeal, printed before the Notes to the Penal Code for the kingdom of Bavaria, according to the Protocols of the royal Privy Council, 3 vols. Munich, 1813, 1814. It reads thus: —

"We, therefore, direct you, with regard to all points which depend upon the interpretation of the penal code, the sense and motive of a legal distinction, and the principles of their application, to refer to the notes, and expressly to mention the respective passage of the notes should you have to make any report for inquiry as to a doubtful point. And it is our express order, that besides this exposition, ordered by ourselves, no officer of the state, or private scholar, shall publish a commentary on the penal code, and that the courts, in trying and judging penal cases, as well as the professors of our Universities in their lectures, shall rely exclusively on the text of the code with reference to the notes, so that the penal code be applied and taught in the same spirit in all parts of our kingdom, and according

to that which we have been pleased to ordain and explain." Still the royal mandate continues immediately thus: —

"We charge you carefully to collect that which, in occurring cases, may appear to you especially important or doubtful, and to send the same, at the conclusion of the first year directly to us, with remarks upon it."

In a similar spirit, and with equally good intention, it was formerly not considered advisable, in Prussia, to allow professors of law to lecture in the Universities on the code, for fear that scientific comments should lead to perplexity, and thus defeat one of the main objects of the code — simplicity of law. Mr. de Savigny was, I believe, the first Prussian jurist, who delivered lectures on the code of Frederic; he began them about the year 1819, if I recollect right.

XIII. It would, indeed, be a subject greatly to be deplored if it were possible — happily it is not — to produce a code so constructed as to be closed forever. It is one of the most efficient agencies in the civil progress of a nation, that, certain principles being established, they should be left to unfold themselves gradually, and to be expanded, modified, and limited, by the civil action of the nation itself, by the practical political intercourse of society.[9] On

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[9] It is almost impossible to exaggerate the beneficial influence upon our common law of that principle of gradual development to which the author here refers, and which has been happily described in the following passage, by one of the ablest judges that ever sat upon the Federal bench: —

"If it were possible to define what it is for a State to deprive a person of life, liberty, or property, without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this, or any other court, to any part of the fundamental law.

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think,

this subject more will be said hereafter; in the present place I beg only to add, in order not to be misunderstood, that I am as zealous an advocate of the certainty of law as any citizen can be, who loves clear right, and, therefore, is anxious to know it. For this reason, in part, I am endeavoring to establish principles of interpretation, or to make them known in a wider circle. I hold myself fully convinced of the great benefit which a wise code may bestow upon a nation, if made at the proper period of maturity of a nation for that purpose; if it contain the essence, the settlement, perfection, improvement, and expansion, of the law, already existing in some shape, way, or form, and be not a futile invention of the closet; and if the law-makers do not believe thereby to forestall all future expansion of the law. A code is not a herbarium, in which we deposit law like dried plants. Let a code be

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in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States." *Per* Miller, J., in Davidson *v.* New Orleans, 96 U. S. 97, 104. (1877.)

"We have, perhaps, an almost superstitious respect for the method in which our jurisprudence has been built up out of actually litigated cases, as distinguished from the speculations and reasonings of the Roman and continental jurists. No new doctrines, not even the simplest application of one, has been added to the edifice until it had been called for, and its necessity proved by some actual controversy between man and man. Thus, its completeness and stability have been insured by what has well been termed 'the remorseless logic of facts.' No single mind, however far-seeing and comprehensive, has been able to build up, in advance of occupation, to suit its own notions of symmetry. There are some who regret this, and consider the ever rough and unfinished outline of our legal system to be a defect; but to us it seems inseparably connected with its merit as the best law under which a free people ever lived. Who can tell in what net of legal principles we should find ourselves enmeshed, if the sages of the fourteenth, the seventeenth, or the eighteenth century could have decided our probable cases in advance for us? And we owe it to our successors not to deprive them of the same freedom we enjoy. If a question yet remains undecided, let it be so till it is asked in a manner to prove that it needs deciding. Do not commit the law in advance to a particular view, merely for the sake of rounding out our theory." West. Jur., vol. II., p. 66, February, 1868.

the fruit grown out of the civil life of a nation, and contain the seed for future growth. The impossibility of closing as it were, the law, has already been acknowledged. In France, and in Prussia many large complements (*Ergänzungen*) have been officially published, and are annually adding to the code.

Never has interpretation been dispensed with; never can it be dispensed with. This necessity lies in the nature of things, of our minds and our language; and in those countries where codes have been established, as in France, Bavaria, Austria, Prussia, &c., some authority is always designated from which, in doubtful cases, explanations shall be obtained; as the council of state, the minister of justice, or some law committee appointed for that purpose.

XIV. The Austrian civil code, introduction, paragraph 8, says, "The lawgiver alone has the authority of giving an interpretation of general and binding authority. An interpretation of this sort is to be applied to all cases yet to be decided, if the lawgiver does not add expressly, that his interpretation shall not apply to the decision of those cases which treat of actions done, or rights claimed, before the interpretation took place."

The Prussian code says, in the introduction, paragraph 47, "If the judge finds the proper sense of the law ambiguous, he has to inform the law committee of his doubts, and to ask for its decision, without, however, mentioning the litigating parties." Paragraph 48, "The judge of inquiry is bound to found his decision in the case upon the judgment of the law committee; the

parties, however, retain their right of resorting to the usual remedies."

Several of these provisions have been adopted from the Roman law. The Roman Emperor decided doubtful cases, which had been reported to him in writing, by "*decreta*."*

The civilians say, "Est autem non raro necessaria legis interpretatio; quam solus quidem facit legislator, in quantum interpretatio vim legis habitura est. Quo respicit, quod scriptum est, uti leges condere, ita et easdem interpretari, solo imperio dignum esse." Voet Comment. ad Pandectas, Lib. I., Tit. III. 18, and every other commentator of the *Corpus Juris*.

The late Mr. Edward Livingston provides in his penal code that "if any penal law shall be so inaccurately drawn, as to bring within its penalty an act that it would not, in the opinion of the court, have been the intention of the legislature so to punish, the accused must be acquitted; but the court shall report such case to the legislature at their next session, or within eight days, if they be in session." † As to interpretation in general, it seems evident that Mr. Livingston relied too much on the possible perspicuity of human speech. He, as well as Mr. Jeremy Bentham, appears not to have a perfectly correct idea of human language, and its exact relation to

* See Lib. 1. *ff de Const. Princ.* L. *fin. pr. de Legib.* See, also, 1 Blackstone, 59.

† Code of crimes and punishments, Book I. chap. 1, art. 9, or page 367 of his system of penal law for the State of Louisiana, Philadelphia, 1833. See, also, his introductory report to the code of crimes and punishments, ibid. p. 139.

things and thoughts. They seem to have imagined that the same degree of clearness of speech, which we find in mathematics, might be obtained in all branches, forgetting, perhaps, in how limited a circle mathematics move, and that otherwise they would at once lose the character of absolute distinctness. Having said thus much, we cannot leave this topic, without guarding ourselves against a misapprehension that we undervalue the merits of these two reflecting men. No lawyer, or politician ought to remain unacquainted with their works, for, whatever reason he may find to dissent from them, in many particulars, he will find enough worthy of being gathered and stored up. We have frequently found that their works are treated with a degree of superciliousness, which can be explained only by a want of acquaintance with them.

XV. If the power of interpretation is thus placed in the hands of those who exercise the authority of government, and if this interpretation has effect not only for the future, but also upon the case respecting which the doubt arises, as is the case with the several nations above mentioned, then the English and Americans consider this manner of interpreting contrary to their constitutional spirit. It approaches, in their opinion, too much to the dangerous union of the attributes of the legislator and the judge; though, strange to say, this very fear, so just and salutary in its kind, has, in some cases, led precisely to the end that was to be avoided. The many constructive offences, for example, in the old English law, were little less than the product of legislating judges. The independence of the judiciary is one of the touchstones

of civil liberty; but, in these cases, the judges did not only act as independent judges dependent upon the law, but they left their proper province, and trespassed upon that of the lawgiver.*

Those who imagine that the uncertainty of law can possibly be avoided, by avoiding all ambiguity of language, forget that, as it was said already, most cases present a compound of simple cases, and furthermore, that the uncertainty of law arises not only out of the general uncertainty of human speech, but frequently also out of the ambiguous terminology of other sciences, arts, &c.† Should the law settle beforehand the meaning of all terms? And what is to be done with reference to the new things and relations, which are discovered, invented, or established, and must, in suits which may occur, be classed under some head or other acknowledged by the law? If in an important insurance case the question has arisen,

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* On the Independence of the Judiciary, and the Progress of Law, see Political Ethics, vol. I the proper chapters, and Civil Liberty, chapters xviii, xix and xx

† The following instance, selected for the very reason that it refers to the affairs of the commonest life, has been taken from "Galignani," Paris, January 18, 1841: —

It was decided some time since by the Royal Court of Paris, in a case of prosecution for the sale of poniard-knives, that no knife could be called a poniard-knife, and as such considered a prohibited weapon, unless it had a guard on the handle, besides a catch-spring to keep the blade fixed when opened. The tribunal of First Instance has just decided to the contrary in a case of some cutlers brought before it for selling Catalonian-knifes (large curved knives, with double edges, pointed handles, and catch-springs); and has declared that all knives having double edges, back and front on the top, with catch-springs in the handles, are weapons prohibited by the law, and liable to seizure."

whether the Bermudas belong to the West Indies or not, and, upon inquiry, it was found that the geographical books differed on this point, was the ambiguity in this case the fault of the law, or could it possibly have been avoided by the wisest foresight of the most profound lawgiver, or the most comprehensive plan of a code? The law could only then be absolutely certain when mankind had ceased to be a living, moving society — a society, whose very existence depends upon an infinite entwining and interweaving of countless interests.

XVI. At all times there have existed many people who, seeing how often in matters of law, as in all other branches, the formality is seized upon instead of the spirit, or being desirous of flattering unguarded crowds, declaim against the niceties of the law, and with it against careful interpretation, as being mere subtleties of the lawyers to harass litigating parties and draw their own profit from a protracted administration of justice. No one who knows the least of the history of judicial administration, or has had an opportunity to observe it in some countries at the present time, will venture to deny, that no branch of government has been at some periods and to this day in some countries — witness for instance Spain and the Spanish colonies, or Germany at the time of the Peasants War, or England when the Star Chamber flourished most, for instance under Charles I. — more scandalously diverted from its real course, has been a greater evil to the community, for the weal of which alone it is established, than the judiciary department. Lawyers have at times formed an almost invincible legion of harpies. But in viewing

evils and endeavoring to find remedies, we must carefully avoid the creating of equally great or greater ones. Again and again have the people been told to throw off their fetters, and to have justice done by plain men of common sense and unsophisticated minds. From ancient times down to the latest, to our own period, it has been asserted, that if the real question were to award true justice according to the simple merits of the case, and not to satisfy technicalities, the difficulty would not be great and lawyers might probably be dispensed with. These persons desire, in fact, a patriarchal administration of justice — the worst of all justice beyond the family circle and in a society at all advanced in civilization. If we examine their desire more closely we shall find that nothing less is demanded than subjective justice — an administration of justice according to the subjective view of the judge, the substitution of individual feelings and views for the general rule and equal law. Nay, they substantially desire *ex post facto* justice declared permanent. The declamations against law and lawyers rest essentially upon the same erroneous principle upon which absolute monarchists found their claims and desires. They wish for a paternal government, a monarch who may rule untrammelled by fundamental laws, according to the fatherly desire of his heart. Let the king be unfettered to do good; let nothing bind him but his conscience; let him be responsible to no one but his God. It is the Chinese rule — parental care, filial obedience — but security, rights and freedom cannot prosper in such a state of things.

It is so frequently forgotten that there are two parties in questions of justice, and that what seems so uncommonly

plain to the one that no possible doubt can exist, according to his opinion, does by no means present itself in the same light to the other. Some acts are lawful in the day time, but not so during night; or they are less punishable if done during the day, than otherwise. If the law at the same time says that night shall be from sunset to sunrise, it seems to be as plain as human language can be. Yet there were not long ago two parties contending in an Irish court, the one maintaining that sunrise means, with regard to the place in question, the rising of the sun above the neighboring mountains, while the other party insisted that sunrise means the time which is indicated as such in the almanac. Both parties probably thought that nothing could be plainer than the respective view which each took, for the very reason that it was of great importance to each to carry his view. In England, it has been settled by act of parliament, in 1837, that night, with regard to burglary, comprehends the space of time from nine in the evening till six in the morning, all the year round. But what is nine o'clock? A life may depend upon showing that a certain act was done at half past eight and not at nine o'clock.

The freer a country, the more necessary becomes interpretation. For one of the main ingredients of civil liberty, and at the same time one of its greatest blessings, is the protection against individual passion, violence, views, opinions, caprice or well meant but disturbing interference — the supremacy of law. This, however, involves the condition that laws, once made, must be administered by others than those who made them, or are making new ones. Without it, the law ceases to be a guarantee; but

if the making and administering are separate, it is necessary that the laws be interpreted, and to do this, justly and conscientiously, the ministers of the law must proceed by proper, safe and sound rules.* In those states where the law making power is the same with the law administering, interpretation in the highest spheres of judicial action is

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* Connected with this fact is the other, which I have touched upon in vol. i. of the Polit. Ethics, that no country has risen in political civilization without the institution of the advocate. Indeed, its very existence proves a considerable step in civilization, because it shows not only that the judge being versed in the law, an equal chance shall be given to the litigating or accused party; in my opinion, it indicates something more; it manifests a degree of acknowledgment that the law shall be the immutable rule — a rule above the judge, not one within his breast. When the European race rose out of the confusion of feudal independence, and law became gradually acknowledged as the supreme rule, and yet the subject not being properly understood, and when, as the same dialectic subtlety which had stolen into all branches, into philosophy as well as theology, the general bent of the European mind very naturally manifested itself likewise in the department of the law. Lawyers actually became, in many instances, the perverters of right, instead of being its protectors. Satire was directed on all sides against them. Not a witty poet who did not discharge his arrows against them, not a carnival in which they were not ridiculed, and not unjustly so. But let us not forget that precisely the same amount of satire, at the same period, was directed in the same vehicles against matrimony. Does any one of us, nevertheless, doubt the necessity of marriage as the very first element of civilization? Lawyers have at times pressed upon society like a very nightmare. They and the ministers of the church have been the worst counsellors of tyranny, the worst flatterers of absolutism, but let us weigh the matter well, and I believe we shall come to the conclusion that the cause of liberty owes to lawyers likewise infinite gratitude. Certainly it is a fact, that if English tyranny, in whatever character it showed itself, has been supported by lawyers, the cause of British liberty has been rescued in a great measure by them.

comparatively unimportant; for the will of the supreme power may at any time be substituted for the law, or may decide any doubtful case according to whatever seems expedient to it.[10]

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[10] See Additional Note E, on Authentic Interpretation.—Ed.

CHAPTER III.

Construction — Its Definition — Twofold Application of this Definition — Necessity of Construction, when Interpretation ceases to avail — Necessity of distinguishing between Interpretation and Construction — Instance — Doctrine of Cy-pres — Science of Hermeneutics — Derivation of the Word — Construction, although dangerous, yet indispensable — Different Species of Interpretation, to arrive at the True Sense — Close Interpretation — Literal Interpretation is an inadmissible Term — Instances of pretended Literal Interpretation — Extensive Interpretation — Liberal Interpretation not a good Term — Extravagant Interpretation — Limited and Free Interpretation — Predestined Interpretation — Artful Interpretation — Authentic Interpretation — Different Species of Theologic Interpretation — Close, Comprehensive, Transcendant, Extravagant Construction — Indemnity Bills.

I. The definition, which has been given of the term Interpretation, shows that it can only take place, if the text conveys some meaning or other. It happens, however, not unfrequently, that in comparing two different writings of the same individual, or body of men, they are found to contain contradictions, and yet are not intended to contradict one another. Or it happens that a part of a writing or declaration contradicts the rest, for instance, some provisions of laws issued even by so high a body as the British parliament. When this is the case, and the nature of the document, declaration, or whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction,[1] we must resort to

[1] It may be questioned whether any kind of writing can, in its *nature*, forbid us from assuming a contradiction in arriving at its meaning. A contradiction is, of course, much less likely to occur in a constitution than in a statute; in a statute,

construction. Construction is likewise our guide, if we are bound to act in cases which have not been foreseen by the framers of those rules by which we are nevertheless obliged, for some binding reason, faithfully to regulate, as well as we can, our actions respecting the unforeseen case; for instance, when we have to act in politics, bound by a constitution, in a case which presents features entirely new and unforeseen.

II. Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text — conclusions which are in the spirit, though not within the letter of the text.

Thus we say, "you cannot construe his refusal into a general unkind disposition towards you," which means, you cannot draw the conclusion, that the utterer is unfavorably disposed to you (the subject which lies beyond the direct expression of the text) from the specific refusal in the present case (the elements known and given in the text.)

In politics, construction signifies generally the supplying of supposed or real imperfections, or insufficiencies of a text, according to proper principles and rules. By insufficiency, we understand both imperfect provision for the cases, which might or ought to have been provided for, and the inadequateness of the text for cases which human wisdom could not foresee, as for instance, the application

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than in an ordinary contract; in a contract, than in a letter; and, consequently, our readiness to explain away any difficult term, as utterly inconsistent with the rest, must be less in the former cases than in the latter. But if a contradiction actually occurs in a statute or constitution, must we not meet it, and construe the meaning of the legislature, or of the people, as we would that of a private writer? — Ed.

of a very ancient charter to cases arising out of entirely and radically new relations, which have since sprung up, which cases, nevertheless, clearly belong to that province of human actions for which the charter was intended.

If we apply the above definition of construction to texts of inferior authority or importance, which partially militate with the demands of superior authority, we shall see, that construction is the causing of the text to agree and harmonize with the demands or principles of superior authority, although they are not, according to the immediate and direct meaning of the words constituting the text contained in it.[2]

It is, as will be seen presently, construction alone which saves us, in many instances, from sacrificing the spirit of a text or the object, to the letter of the text, or to the means by which that object was to be obtained. And, without construction, written laws, in fact any laws or other texts containing rules of actions, specific or general, would, in many cases, become fearfully destructive to the best and wisest intentions, nay, frequently, produce the very opposite of what it was purposed to effect.

III. The definition which has been given, involves the fact that the constructor is not allowed to proceed without

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[2] Another use of construction may be shown by means of the following quotation: —

"One of Boswell's resolutions, often made, and as often needing to be made again, was to be grave and reserved, though cheerful and communicative." Life of Boswell, in Encyclopædia Britannica, vol. IV., p. 78. The sentence illustrates a fault too common, especially in writings upon moral topics, to which the exact tests and accurate definitions of physical science cannot be, or, at least, never have been, applied; and it calls for a peculiar kind of construction. Interpretation certainly can make nothing of it; for, the more clearly we fix the meaning of each term employed, the more exactly do they neutralize each other, and leave no meaning at all expressed. But when we know the occasion upon which they were employed, we can easily see that the true meaning of the whole expression is to avoid either of the extremes indicated, and to adopt one's manner to the occasion. — Ed.

rule or arbitrarily; he has to draw conclusions (of course correct and faithful ones) from the elements given in the text. This, if properly analyzed or applied, gives us all the necessary rules of true construction.

The proper principles of construction are those which ought to guide us in good faith and conscience. They may be twofold, according to what has been seen in section II.:

1. If the text is itself a declaration of the fundamental principles which we are bound to follow in a certain sphere of actions, and of certain fundamental forms which are to regulate our actions, in this case construction signifies the discovery of the spirit, principles, and rules that ought to guide us according to the text, with regard to subjects, not specified, but which nevertheless belong to its province. If, for instance, a political constitution or charter has been adopted or granted, to regulate our political actions, and a case occurs which has not been directly provided for, but which is of an undoubted political character, we have faithfully to search for its true spirit, and act accordingly in the case under consideration. Analogy, or rather parallel reasoning * in this signification of construction, is the essential means of effecting it.

* It will be observed that analogy in this case signifies something very different from that reasoning by analogy, against which the author declared himself strongly in his Pol. Ethics. There he spoke against reasoning on comparisons of totally different things; here he speaks of subjects belonging to the same sphere. Indeed, analogy in the present case means nothing more than a reasoning by proportion. In the case, provided for by law, or decided already, we have: If A and B exist, then D shall take place. In the case to be construed we have E, similar to A, and F similar to B, hence let G be similar to D, in the same proportion. [See also Supplementary Note G, on Analogy.]

2. Or there may exist principles or rules of superior authority, and the problem of construction then is to cause that which is to be construed to agree with them. In this case the principles and rules of superior authority are the "subjects that lie beyond the direct expression of the text" mentioned in the definition.

For instance, morality is one of the chief ends of all human life; without it no state can exist. This is the superior principle. If, therefore, a testator leaves a will containing provisions of an immoral character, striking out these provisions is called construing it, *i.e.*, making it harmonize with the general and great object of all government, without thereby invalidating the whole will. Or if a law be passed, parts of which are contrary to the fundamental law of the state, it is called construing the law, when the proper judges declare these parts to be invalid. This is acknowledged in the United States, and in a similar manner does the civil law declare that: —

"The judge shall be guided by the strictness of the law, and not consider what the emperor has declared against the law." (3) C. 11 de judiciis (III. 1) and

"Quae facta laedunt pietatem, existimationem, verecundiam nostram et (ut generaliter dixerim) contra bonos mores fiunt, nec facere nos posse credendum est." Papinian in the Digest, L. xxviii. t. 7, 15.[3]

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[3] It is doubtful whether this passage will properly bear the sense the author puts upon it. The judges of Justinian and his successors would hardly have ventured to disregard any official utterance of the emperor, on the ground that it was contrary to the fundamental principles of law. Indeed, such a construction would have found no support in those principles, the very basis of which was, *Quod principi placet, legis vigorem habet.*

The Constitution itself is of doubtful authenticity. It is in Greek, without address or date, and conjecturally ascribed to the Emperor Zeno. Cujas remarks that in some copies it is missing altogether, and that the owners of such copies lose little or

When the codes of some countries declare, that in case the judge can find no law precisely applicable, he shall be guided by the spirit of the provisions enacted for those cases which resemble that most under consideration, they authorize construction according to the first part of our definition. The Austrian code prescribes the mode just mentioned. See the same, Introduction, 7. In penal judicature no legal action can take place in a case unprovided for by law; yet the Chinese code applies construction of this sort even to offences and crimes.*

Treaties are sometimes also made, defining the boundaries of countries imperfectly known, which, when they come to be acted upon, are found to contain language not applicable to the actual state of things, in which case we must have recourse to construction.[4]

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* See Sir George T. Staunton's Penal Code of China, sect. XLIV. p. 43. See also Supplementary Note J. on Criminal or Penal Law. — Ed.

nothing. Observationes, Lib. IX., c. 20. A *scholium* of Theodorus Hermopolitas accompanies it, explaining it to mean that the judge was to follow the law (*jus et scriptum legitimum*, as the Latin version reads), even though private orders from the emperor himself bade him do otherwise. In this sense, it is a mere repetition of the well-known *dictum* of Tiberius, reported by Cedrinus, and of a Constitution of Anastasius. Code, Lib 1., tit. 22, c. 6. Similar instructions are also found in several passages of the Novels of Theodosius and Justinian. Their real meaning may no doubt be expressed in the terms used in the rubric of Tit. xxxix of the Novels of Theodosius. *In damnum publicum non valere rescriptum, nee specialia beneficia generalibus præferenda.* Ed. Goth. VI., p. 17. It hardly need be added that no trace of constitutional limitations, in the modern American sense, or of the control of one set of legislative rules by the superior obligation of another, is found in ancient law. See an article on "Constitutional Limitations," in 3 Western Jurist, pp. 65–81. April, 1869. — Ed.

[4] This is well illustrated by that part of the treaty of 1846, between the United States and Great Britain, which related to the determination of the boundary-line to the Pacific Ocean. The words of the treaty were as follows (art. 1.): —

"From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing treaties and conventions terminates (*i.e.*, from the Rocky Mountains, Treaty of 1842, art. 2), the line of boundary between the territories of the United States and those of her Britannic Majesty shall be continued westward along the said forty-ninth parallel of north latitude, to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly

IV. In the most general adaptation of the term, construction signifies the representing of an entire whole from given elements by just conclusions. Thus it is said "a few actions may sometimes suffice to construe the whole character of a man."

It was not without repeatedly weighing the subject, that I first ventured upon the distinction between interpretation and construction; for, if clear distinction is one of the efficient means to arrive at truth, it is equally true that subtleties impede instead of aiding in seizing upon it. Many political contests, however, in which both parties seemed to me equally honest, as well as frequent disputes in law, led me to the distinction, and I had the great satis-

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through the middle of said channel, and of Fuca's Straits, to the Pacific Ocean; provided, however, that the navigation of the said channel and straits, south of the said forty-ninth parallel of north latitude, remain free and open to both nations." The difficulty and the claims of both parties are clearly set forth in an article by Dr. Woolsey, entitled "The Treaty of Washington in 1871," to be found in the *New Englander*, for July, 1873, p. 530. He says: —

"When the 'middle of the channel which separates the continent from Vancouver's Island' is spoken of, it is plain that the parties to the treaty conceive of but one channel; or, at least, that each party supposed that there was but one channel answering the conditions named. With the increase of navigation in that quarter, they became aware that there were two principal channels, besides several smaller ones, between the islands. One of these, nearest to Vancouver's Island, and westward of the group to which the island of San Juan belongs, had for more than half a century been called the Canal de Haro; the other, situated to the eastward of these islands, and near the continent, had gone, in quite recent times, by the name of the Straits of San Rosario. The British government claimed that the line of boundary ought to run, according to the true sense of the treaty, through this latter passage; our government claimed that it ought to run through the channel nearest to Vancouver's Island. The mean distance between the two passages cannot be more than twenty miles. The British interpretation would give the San Juan group, and the jurisdiction over the western channel, to Great Britain. The treaty provides that the channel through which the line should be drawn (as well as the Straits of Fuca) should be open to both nations south of the forty-ninth parallel. To the United States it was important to have a treaty-right, besides any right according to the law of nations, to navigate the Canal de Haro. To Great Britain the possession of the islands named appeared to be of value, and San Juan itself was regarded as almost necessary for the defence of Vancouver's Island."

The whole matter was submitted to the Emperor of Germany, under the treaty of Washington, and, after reports had been obtainod from experts and jurists, decided, October 21, 1872, in favor of the claims and construction of the United States. — Ed.

faction of finding that since the first publication of the present tract, two of our most distinguished lawyers have fully concurred in the distinction between the two, and have adopted it.*

Many cases would be settled with greater ease, and to the greater satisfaction of the interested parties, if this distinction were strictly kept in view. We have first to settle whether construction is at all admissible, or whether it be absolutely indispensable, as, I believe it has been seen, it actually is in many cases. After this we have to settle whether, in the given case, interpretation suffices, or whether we must have recourse to construction. The following case is in point.

A gentleman whom we may call Thomas Cumming, a bachelor, and a native of Great Britain, accumulated a considerable fortune in the United States; he died, and

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* The distinction is now (1860) very generally accepted. The President's Message, of December, 1848, speaking of the American system, makes use of the terms, Construction, Interpretation and Precedent in their proper meaning.[5]

[5] While the distinction thus made by our author between the two terms has been recognized by many high authorities, and has done much to promote accuracy of thought, it can hardly be said to have been generally accepted by legal writers. The two words are still too often used interchangeably, as in the following passage from a writer of note: —

"If the statutes had been drawn with greater forecast than they have been, still our language does not contain general terms which are also so precise as to avoid all question as to their meaning, and application in detail; while the attempt was to sunder the common-law unity in part, but not in whole. Moreover, these statutes have nearly all been passed under a divided opinion in the legislative body; and the friends of this change have striven to secure what they practically could, hoping, at the same time, to induce the courts to grant by *interpretation* more than the legislature would do by express enactment. Perhaps, in some instances, the friends of the new legislation have had just ground for disappointment, the courts putting too strict a *construction* upon the statutes; while, in other instances, they have complained unjustly because the courts have refused to give by *interpretation* what it was plain the legislature did not mean to do by direct act." Bishop on the Laws of Married Women, vol. II., § 7, *ad fin.* — Ed.

his testament showed that he had bequeathed a large sum to "his nephew, Thomas Cumming," in England. The latter was dead at the time of the making of his uncle's will in America, leaving, however, an only child, likewise called Thomas Cumming; but the death of the one and the birth of the other were equally unknown to Thomas Cumming, the eldest, at the time when he made his testament, and down to the time of his decease. Now it was contended that T. Cumming, the testator, did not leave the sum to T. Cumming, the nephew, he being already dead; and that the birth of the youngest Cumming, not yet being known to the testator, he could not have meant him. It is evident that according to the true import of the term "interpretation," the argument was good; for according to the true meaning of the testator's words, that is according to the meaning which he attached to them, he cannot have meant T. Cumming the youngest. But there being no T. Cumming, whom the testator meant, in existence, the question becomes this, how shall we draw our conclusions and apply them to the subject, which lies beyond the direct expression of the text, from elements known by and given in the text? — the testament in the present case. Is the testament our guide or not? It evidently is; then construction becomes necessary if interpretation is insufficient, and the elements afforded us by the text will lead us to the just and true conclusion, that Thomas Cumming the eldest meant to leave the sum in question to the English branch of his family, and that T. Cumming the youngest ought to receive it.*

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* The following is added from the English reports in January, 1843: — The great will cause of Blundell *versus* Gladstone was decided yesterday,

The whole doctrine of Cy-pres belongs to construction. See 2 Story on Equity, 415.

Nor does the distinction do violence to language, whether we view the two terms as used in common life, or in respect to their etymology; for construction, from *construere*, means to build up. Lawyers frequently call both construction; divines, on the other hand, use interpretation for both.

V That branch of science which establishes the principles and rules of interpretation and construction is called *hermeneutics*, from the Greek ἑρμηνευω to explain, to interpret; and the actual application of them *exegesis*, from the Greek ἐξήγσις, explanation. Hermeneutics and exegesis stand in the relation to each other as theory and practice. In England and America these terms are generally used by theologians only, but the Germans, who first brought them into use, apply them equally to philology and divinity. There is no reason why this term should not be used in all sciences in which interpretation and construction become necessary; in short in all branches in which we are bound

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in the Court of Chancery; when Mr. Justice Pattison and Mr. Justice Maule attended to state their judgment on a trial at law. Mr. Charles Robert Blundell left property, by a will dated 1837, to the second son of Edward Weld, of Lulworth, and his issue: there was no *Edward* Weld, of Lulworth; but *Joseph* Weld, of Lulworth, had a son *Edward* Joseph, now dead. The property was contested by the heirs-at-law, Lord Camoys and Lady Stourton, on the ground that the will was void; and by Thomas Weld, the second son of Joseph Weld, on the plea that by *Edward* Weld, of Lulworth, the will clearly meant *Joseph* Weld, of Lulworth. So the Vice-Chancellor had decided; the Judges concurred; and the Lord Chancellor now confirmed the previous decisions. Under the circumstances, however, the costs of the suit were ordered to be paid out of the estate.[6]

[6] Blundell *v.* Gladstone, 11 Simons 467. — Ed.

carefully to ascertain the sense of words and regulate actions according to their spirit and true import.

VI. For the very reason that construction endeavors to arrive at conclusions beyond the absolute sense of the text, and that it is dangerous on this account, we must strive the more anxiously to find out safe rules, to guide us on the dangerous path. For, although dangerous, we cannot possibly escape it; because times, relations, things change, and cannot be foreseen by human intellect; nor is it given to any man to provide for all cases already existing, or to use language which shall leave no doubt. Many things are dangerous, yet we cannot dispense with them nevertheless.

It lies likewise in the nature of things that, in many cases, interpretation and construction must closely approach to one another; but still the distinction is clear. Food and poison are very distinct things, although in some cases they approach so closely that it would be difficult to decide, with absolute certainty, which term we ought to choose.

That, from the nature of interpretation and construction, since they signify the arriving at something certain from something ambiguous or uncertain, good faith and common sense are indispensable in the application of the principles furnished by hermeneutics to the complex cases of practical life, is evident. More on this subject will be presently given.

VII. An individual may use some words which every one understands, and which, for the case, are sufficiently clear; but if you ask him as to the exact limits to which he wishes to see his remarks extended, or put to him a number of cases in progressive connection with each other,

he himself will be doubtful, in most instances, how far he would extend the application of his remark. The consequence is, that interpretation may be more or less comprehensive according to the sense which we may be in duty bound to give to some particular words, not, be it mentioned here in anticipation, that the object of interpretation can ever vary, or that there can be two true meanings in any text. The sole legitimate object of all interpretation is to find out the true sense and meaning, not to impart any meaning to them; but since this true sense is occult, we may be bound to use various means to arrive at it to the best of our ability, and according to the conscientious desire of finding the true sense. We have, therefore, to note the following different species of interpretation.

VIII. Close interpretation (interpretatio restrictiva) is allowable, if just reasons, connected with the formation and character of the text, induce us to take the words in their narrowest meaning.

This species of interpretation has been generally called literal interpretation, a term inadmissible, in my opinion. Literal interpretation ought to mean of course, that which takes the words in their literal sense, which is hardly ever possible, since all human language is made up of tropes, allusions, images, expressions relating to erroneous conceptions, &c., for instance the expression, The sun rises. Literal interpretation would signify, moreover, in most cases, a contradiction, since there can be but little doubt as to the meaning of a sentence, if the words may be taken in a literal signification, so as to make sense at all.

Interpretation, therefore, would be superfluous. On the other hand, it is very difficult to say where the literal signification of a word ends, and the figurative begins. In reading Latin no one would insist that the literal sense of Confutare is to check boiling water by pouring in cold from a vessel called *futum*, or *futis*, although this was the original signification. In other cases, it would be difficult to say what is the literal meaning. Is the word *going*, if used of a vessel proceeding from one place to another, used in its literal sense or not? If we substitute original meaning for literal, we find at once the impropriety of the term. To Give is a word found in all Teutonic and many other languages, and is, probably, derived from the ancient word Gaff, the hollow of the hand, so that the original meaning is identical with our word to Hand. But is, on this account, the expression "I give," used in a will, to be declared void, although sound reasons may prevail to adopt the closest possible interpretation, because the testator, being dead, cannot any longer *give*, in its literal sense, something to another person, because he cannot use any longer his hands? Or are we to make a distinction between original and literal meaning? If so, where are the limits, and what possible good can we derive from it?

These remarks are not without practical importance. Enormous crimes, and egregious follies have been committed under the pretended sanction of literal interpretation, using interpretation as a means to promote certain objects, while its simple and only object is to ascertain and fix the true sense of a text.

When that poor tavern keeper in England, whose inn had the sign of a crown, was sentenced for treason, because

he had jestingly said, that he had made his son heir to the crown, his judges thought they interpreted literally, and maintained that it was a case which called for literal interpretation. Had they used close interpretation, they could never have reached the life of the poor tavern keeper, at least in this way. For the closer the interpretation was taken, the closer it would have come to his tavern crown. Literal interpretation is a most deceptive term; under the guise of strict adherence to the words, it wrenches them from their sense.[7]

If we understand by literal interpretation, a species which, by way of adhering to the letter, substitutes a false sense for the true one, it has no more meaning than the term "false facts." It is false, deceptive, or artful interpretation, if we do not give that sense to words which they ought to have, according to good faith, common sense, the use which the utterer made of them, &c.

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[7] A very curious instance of the absurd consequences to which the application of formal rules of interpretation may sometimes lead, is found in the somewhat celebrated case of Pleasant *v.* The State, 13 Ark. 560. This was an indictment against a negro for an attempt to commit a rape on a white woman; and it was properly enough held, that, as the statute provided expressly for the case of an assault by a person of one color upon another, the color or race of the two parties respectively must be proved by the State, as laid in the indictment. The court also held that the jury must have formal proof that the prosecutrix was a white woman; and that the fact of their having seen her, known her, and heard her testify would not sustain their finding without such proof. This ruling, too, may no doubt be sustained under the modern authorities, though it, perhaps, marks more clearly than any other case in our books the entire change which, in the course of centuries, has been produced in the office of the jury, who were originally produced as witnesses testifying of their own knowledge. But when the prisoner's counsel further asked the court to charge that the State must likewise prove the defendant to be a negro, in order to convict, and, *though he was black*, their seeing him was no proof that he was a negro, the court refused so to charge; holding that, *inasmuch as the instruction assumed that the prisoner was black*, the presumption, arising from color, that he was a negro, would prevail. In other words, the jury were not allowed, from the evidence of their own senses as to the color of the woman, to find that she was a white woman; but that the assumption, in an instruction by the prisoner's counsel, that his color was black, was conclusive of the fact that he was a negro. Had the court founded its ruling on the literal meaning of the word *negro*, there might have been a little more plausibility in the argumentation. — Ed.

The canon law prohibits the ministers of the Roman Catholic church from shedding human blood. Many bishops and other ecclesiastics of the middle ages, therefore, who could not resist the universal spirit of warfare and robbery of those times, for instance of the 11th and 12th centuries, fought with maces, without thorns or points. Philippe-de-Dreux, bishop of Beauvais, a redoubted warrior, famous for his robberies and cruelties, killed, in the battle of Bouvines, every one he could reach with his mace. Wulson, author of the Heroic Science, speaks of a similar license for the warlike bishops of that time as generally admitted.*

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* See, among other works, Histoire Civile, Physique et Morale de Paris, by T. A Dulaure, Paris, 1825, 3d ed. vol. ii. p. 415 et seq.

According to a similar misinterpretation, as it seems to me, the same law was held to prohibit priests from practising surgery, but not medicine, as they frequently did in earlier times, when priests were the few who possessed any science whatever. If there was no particular reason for this distinction, which I do not know, the fault arose out of the omission of paying attention to the *usus loquendi*. Single words were taken in their respective significations, but it was not literal interpretation for all that. Shedding blood is not the opening of veins or arteries, but the doing it with violence, to the harm of the wounded.

Innumerable dogmatic aberrations from the path of religion, have had and have their origin in this species of misinterpretation. The above instance brings another to my mind, likewise belonging to the history of the catholic church, though quite as many instances may be found in law, if we refer to the time of the schoolmen.

It was one of the monastic punishments to wall up the criminal alive. This was called "*In pace*," at least with the Franciscans, because every member said: In pace requiescat, when the fearful ceremony was concluded, and the last brick immured the criminal, never to return. It has not frequently occurred, but sometimes it actually has. The annals of the Franciscans say that even their saint threatened a brother, who

IX. Extensive interpretation (interpretatio extensiva,) likewise called liberal interpretation, is that which inclines towards adopting the more or most comprehensive signification of the word. Extensive or comprehensive interpretation seems to be a better term than liberal interpretation.

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refused to visit a leprous man, with this punishment. The reason why the order preferred this punishment was because: Ecclesia non sitit sanguinem (the church thirsteth not for blood); they preferred, therefore, this, in appearance, less violent infliction of death. But even if the actual infliction of death were less violent than hanging — although most persons will believe that immuring must greatly protract the last agony of death, and give full time to the horrors of despair — the interpretation of *sitire sanguinem* would not be more correct, simply because Sanguis stands here as part for the whole, namely, Life. Ordres monastiques, vol. iii.

The "Franciscan," who fought so gallantly by the side of Andrew Hofer, against the French and Bavarians, had nothing but a white staff, but he led many an assault on the enemies' batteries. He was a noble patriot, but did he shed no blood?[8]

[8] Rabelais has made Frère Jean an obedient son of the Church in this respect. His famous victory is too good an illustration of the text to be omitted here:—

"Ce disant, mist bas son grand habit, et se saisit du baston de la croix, qui estoit de cueur de cormier, long comme une lance, rond a plein poing, et quelque peu semé de fleurs de lys toutes presque effacees. Ainsi sortit en beau sayou, mist son froc en escharpe, et de son baston de la croix donna brusquement sus les ennemys, qui, sans ordre ne enseigne, ne trompette, ne taborin, parmi le cloz vendangeoyent. Car les porteguidons et portensignes auoyent mis leurs guidons et enseignes l'oree des murs, les taborineurs auoyent defoncé leurs taborins d'ung cousté, pour les emplir de raisins, les trompettes estoyent chargees de moussines; chaseun estoit desraué. Il choqua doncques si roiddement sus eulx, sans dire quare, qu'il les renuersoit comme porcs, frappant a tors et a trauers a la vieille escrime. Ez ungs escarbouilloit la ceruelle, ez aultres rompoit bras et jambes, ez aultres deslochoit les spondiles du col, ez aultres demolloit les reins, auailoit le nez, poschoit les yeulx, fendoit les mandibules, enfoncoit les dens en la gueulle, descroulloit, les omboplates, sphaceloit les greues, desgondoit les ischies, debecilloit les faucilles. Si quelqu'ung se douloit cocher entre les seps plus espes, a icelluy froissoit toute l'arreste du dos, et l'esrenoit comme ung chein. * * *

"Ainsi, par sa proesse, feurent desconfiz tous ceulx de l'armee qui estoyent entrez dedans le cloz, jusques au nombre de treize mille six cens vingt et deux, sans les femmes et petitz enfans, cela s'entende tousiours. Jamais Mangis hermite ne se porta si vaillamment a tout son bourdon contre les Sarrasins, desquelz est escript es gestes des quatre fils Aymon, comme feit le moyne a l'encontre des ennemys, avec le baston de la croix." Rabelais' Gargantua, Lib. I., chap. 27. — ED.

The latter sounds as if a disposition of the interpreter were to be indicated, while his true object is to ascertain the exact meaning; at least the term ought to be reserved for those cases where we actually strive, for some reason or other, to give the most liberal sense to a set of words, for instance in a case which strongly calls for mercy, though the law is distinct and demands punishment.

Long after the preceding passages had been written a very striking confirmation of their contents came to the knowledge of the author.

Sir Frederic Pollock, at a later period chief baron of the Exchequer, used the following words when counsel for John Frost, indicted for high treason in 1840: "If there be any phrase I deprecate for all purposes it is that of 'a liberal construction' of any statute, * * * and, my Lords, I believe that this had the perfect approbation of the late Lord Tenderden, when arguing before him I took the liberty of saying, as I do now before your lordships that we ought not to hear of strict construction or of liberal construction, but that the only thing we have to look for is the 'true construction,' be that what it may."*

Extravagant interpretation (interpretatio excedens) is that mode of interpreting, which substitutes such meaning as is evidently beyond the true meaning; it is, therefore, not genuine interpretation.

Interpretation may, likewise, be limited or free.

Free or unrestricted interpretation (interpretatio soluta) proceeds simply on the general principles of interpretation

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* Page 11, vol. I., Townsend's Modern State Trials, London, 1850.

in good faith, not bound by any specific or superior principle. Limited or restricted interpretation (interpretatio limitata) takes place, if other rules or principles than the strictly hermeneutic ones, limit us.

If, for instance, an individual were to say, "I neither believe nor disbelieve the bible, but intend to find out its true sense, and then to be determined whether I shall believe in it or not," it would be unrestricted interpretation. If, however, the inquirer has already come to the conclusion, that the scriptures were written by inspired men, that, therefore, no real contradiction can exist in the bible, and he interprets certain passages accordingly, which *prima facie* may appear to involve a contradiction, it would be limited interpretation. See Ernesti, Institutio Interpretis, part i. section i. chap. ix.

All proclamations, orders, &c., of a British monarch or the government of the United States, are subject to interpretation restricted or limited by the acts of parliament or congress, if they require interpretation at all, and would otherwise clash with these acts.

X. Finally, interpretation may be predestined (interpretatio predestinata), if the interpreter, either consciously or unknown to himself, yet laboring under a strong bias of mind, makes the text subservient to his preconceived views, or some object he desires to arrive at. Luther, in his work, De Papatu, charges the catholics with what is called here predestined interpretation of the bible, inasmuch as in his view they do not seek for the true meaning of the bible, but strive to make it subservient to their preconceived dogmas. This peculiar species of

interpretation would not have been mentioned here, for it is not genuine interpretation, were it not so common in all branches, in sciences and common life, in law and politics not less than in religion, with protestants as habitually as with catholics, so that none of us can be too watchful against being betrayed into it. It corresponds to what might be called in ratiocination, *ex post facto* reasoning.

A peculiar species of predestined interpretation is artful interpretation (interpretatio vafer), that, which, by cunning and art, attempts to show that the text means something which was not, according to the interpreter's own knowledge, the meaning of the author or utterer. Artful interpretation is not always immoral.[9] A legal counsel is understood to produce everything favorable that can be brought to bear upon the case of his client, so that, the same being done on the other side, all that can be said for and against the subject, may be brought before the judges. That counsel ought not to swerve from the common principles of morality in this, as in any other case, is evident.

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[9] A singular example of artful construction, employed to remedy the evils of ignorant legislation, is found in the jurisprudence of Iowa. By an act of the Territorial Legislature (extra session of 1840, sect. 8, chap. 29), it was provided that "*none* of the statutes of Great Britain shall be considered as law in this Territory." This provision led to grave doubts as to the common law itself; since that law, as adopted in this country, is largely composed of the statutes passed, from time to time, previous to the settlement of the colonies. In a case involving a question of dower, it was even doubted whether the statute of Merton (A. D. 1235-6) had not been repealed by the section above quoted. Of course, the statutes of Westminster, of wills, of uses, of fraudulent conveyances, etc., would all have gone, too! But the court gravely held that by the "statutes of Great Britain" the Legislature could only have intended those passed after the union of England and Scotland, in 1707, since no earlier statutes were known by that title. As nobody had any interest in claiming that any of the English statutes passed subsequently to the settlement of the colonies, in the reign of James I., were in force, this construction satisfied the letter of the law, without harming any one. O'Ferrall *v.* Simplot, 4 Iowa, 381. — Ed.

The same remark does not apply to political party affairs, for this simple reason, that in matters of law final judgment is given by, and the arguments on both sides are stated before, the same judges at the same time, and before judges who form no party themselves nor belong to any of the contending parties. The comparing of political party-matters either to legal strifes, or to real warfare, is unsound in principle, and has created great mischief. It must be counted among the many subjects which have done infinite injury to society, by a confusion of ideas and words and a misapplication of similes in their departments. If we see violent party struggles, and the advocates on both sides maintaining the authority of the same instrument, perhaps of the same provision, let us ask ourselves, which of the two proceeds on genuine and which on artful interpretation; which proceeds upon the instrument itself, and which has some distant object beyond it, or starts from some preconceived views, or interested motives. Frequently this inquiry alone will contribute essentially to our arriving at the real state of things.

XI. Authentic interpretation[10] is called that which proceeds from the author or utterer of the text himself; properly speaking, therefore, it is no interpretation, but a declaration. If a legislative body, or monarch, give an interpretation, it is called authentic, though the same individuals who issued the law to be interpreted, may not give the interpretation; because the successive assemblies

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[10] See supplementary note E, on Authentic Interpretation. — ED.

or monarchs are considered as one and the same, making the law and giving the interpretation in their representative, and not in their personal characters. Authentic interpretation, therefore, need not always be correct, though it has, if formally given, binding power. Still it may be reversed by a subsequent law.

According to the means which we make use of to assist us in interpretation, we find with some writers the following species: *interpretatio usualis*, if we interpret on the ground of usage, *doctrinalis*, if in a scientific way, *grammatica*. *historica*, *historico-grammatica*, *logica*.[11] *Interpretatio declarativa* is that interpretation which settles the meaning of a term until then of vague or ambiguous signification, *e.g.* the word *game* having been used, it is finally settled what animals shall be classed under this head, and which not.

Some authors, for instance, Rutherforth, have divided interpretation into three kinds, literal, rational, and mixed. These terms, however, as well as many of the above, lose greatly in their importance, or become actually inadmissible, if we adhere to our definition of interpretation, which is to find the "true sense." There can be then no literal sense, and besides it, another. A single word may signify indeed several things, and in order to determine in which sense it has been used in a particular passage, we shall be obliged, as a matter of course, to use grammar, etymology,

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[11] To this list may be added, on the best English authority, a very characteristic term. "This would, indeed, be *interpretatio viperina*, as the doctors call it, where the comment destroys the text." Blackstone, Law Tracts, I., 23.

Upon the various kinds of interpretation, and the division of the subject by other writers, see Supplementary Note B.—ED.

logic, and every other means, which are in constant use among men, to understand the words of one another. This has been clearly shown as early as by Ernesti in his Institutes already cited. See sect. XI. I.

XII. Owing to the peculiar character which the bible possesses, as a book of history and revelation, and the relation between the old and new testaments, we find that some divines ascribe various meanings to the same passages or rites, and that different theologians take the same passage in senses of an essentially different character. We hear thus of typical, allegorical, parabolical, anagogical, moral and accommodatory senses, and of corresponding modes of interpretation. For information on this subject, the reader must refer to works on theologic hermeneutics. In politics and law we have to deal with plain words and human use of them only.

The chief subjects we have to interpret or construe, as citizens, are spoken words or entire speeches, letters, orders and directions, deeds, contracts, wills, laws, compacts and constitutions or charters, declaring and defining fundamental rights or privileges. Whether we are lawyers or not, we may be called upon to vote upon subjects requiring the interpretation of some of these; and whether we shall ever be members of legislative bodies or not, every citizen of a free country is not only permitted to form his opinion upon all prominent features of his government, fundamental laws, public men, and important measures, but it is his duty to do so. Every citizen may become an executor of a will, in which he may be called upon to inter-

pret provisions, which materially affect the well being of large numbers of unprotected orphans; he may, in times of great importance, find himself in an office of a delicate character, and he may at any day be charged to decide upon matters of grave importance, in the most sacred character a citizen can assume, namely, as a juror. It will be found necessary, therefore, for every citizen to know how to interpret correctly and faithfully, and however brief, compared to the magnitude of the subject, this work will be, I shall nevertheless, endeavor to lay down the most essential principles, sufficient at least to direct attention to the main points.

XIII. Before we proceed to them it will be necessary to settle the meaning of some terms respecting construction. Construction is either close, comprehensive, transcendent, or extravagant, similar to the corresponding species of interpretation.[12]

1. Close construction is that which inclines to the directest possible application of the text, or the principles it involves, to new or unprovided cases, or to contradictory parts, in short, to subjects which lie beyond the words of the text.

2. Comprehensive construction is that which inclines to an extensive application of the text, or the principles it involves, to new, unprovided, or not sufficiently specified cases or contradictions.

3. Transcendent construction is that which is derived from, or founded upon, a principle superior to the text;

[12] See Supplementary Note B, on Division of Interpretation by Various Authors, and note 2, p. 111 *post*. — Ed.

and, nevertheless aims at deciding on subjects belonging to the province of that text.

When, in August, 1835, the postmaster of the city of New York applied to the postmaster-general of the United States for instruction, respecting certain incendiary publications, sent by persons, usually called abolitionists, to his post-office to be transmitted to the south, and retained by him (the New York postmaster), the postmaster-general answered, that there was no part of the postal law, which would authorize the post-office establishment to decline the carriage of newspapers or other publications on account of their contents. Such interference would, in fact, amount to an interference with the "freedom of speech, or of the press," so distinctly guaranteed by the Constitution of the United States. See Mr. Calhoun's Report on the Attempts to circulate through the mail inflammatory Appeals, &c.; made to the Senate, February 4, 1836. Yet the postmaster-general did not absolutely discountenance the measure of the New York postmaster; he only throws him on his own responsibility, arguing thus: "The post establishment is for the convenience, intercourse, &c., of and between the people, not for their destruction; hence it ought not to aid in destructive measures." See the letter of the postmaster-general, dated August 4, 1835, to the postmasters in Charleston and in New York; among other records of the times in Niles's Weekly Register, Baltimore, August 22, 1835. The majority of the people seemed to acquiesce in this decision, although it must be owned it has a leering similarity with the decision of the French court, under the present emperor, establishing the right of government to open suspected letters, on the ground that

government establishing post-offices, it cannot be expected to carry letters dangerous to itself.*

Since the decision was first made in 1836, the idea it contained has been carried much farther, and the postmaster-general of President Buchanan decided that each postmaster should stop and destroy any inflammatory publications or papers, meaning of course writings against slavery. Where is it to stop? *

It is this that I would call transcendent construction — dangerous in the highest degree, yet not always unavoidable. Still, although at times unavoidable, it is wise that each case of magnitude should be followed, wherever feasible, by an act of indemnity, as it is termed in British terminology; for, although such an act may, in many cases, be obtained by the same power of popularity, on the strength of which first the transgression of the law was ventured, it will nevertheless have its tendency to check.†

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* With reference to both these passages see Civil Liberty in the respective places. [Chap. IX., notes on pp. 89–92, third ed. by Dr. Woolsey, Phila., 1875. — Ed.]

† The British opposition has always, and especially in 1807, demanded that exceptions of the kind for which ministers demand afterwards acts of indemnity, must be rare, must not touch on the fundamentals of the constitution, that their necessity for the common good must be proved, and that this necessity must not be caused by ministers. In the year 1766, when there was a great scarcity of grain in England, Chatham, then at the head of affairs laid an embargo on all vessels exporting grain, by order of council. As soon as parliament met, he himself called it "an act of power justifiable before parliament on the ground of necessity." He read a paragraph from Locke to show that although his act was not *legal*, yet it was *right*. Indemnity for all who had acted under it, was passed. Chatham's Correspondence, vol. III. p. 127. In 1807 the ministers levied taxes on American imports, a month longer than allowed by the American Act.

In the Political Ethics I have spoken of the unconstitutionality and destructive tendency, to all substantial liberty, of a frequent travelling beyond the precise limits of a funda-

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The debates on the occasion are of high interest. See Hansard Parl. Deb. vol. ix. p. 996–1001. In 1818, ministers demanded indemnity after the suspension of the habeas corpus act, not only for themselves, but for the magistrates which had acted by direction of ministers against it. Hansard, vol. xxxvii. In 1826, oats were permitted to be imported against law, on account of a failure of oats in England. For the debates on indemnity for this act against law, see Hansard, New Series, vol. xvi. In 1838, however, indemnity was thrust upon a high officer. Earl Durham, governor-general of the Canadas, had sent some insurgents, having acknowledged the fact of having used arms against government, to the island of Bermuda, under penalty of death, should they return. Lord Durham did it to save their lives, because they must otherwise have been executed. The measure was declared by the British law officers, to be illegal, because Bermuda did not belong to the governor-general's territory, he therefore could not bind the exiled to stay there; besides, the insurgents had not been legally tried. Whereupon Lord Brougham brought in the Canada Government Indemnity bill, which declares the act of the earl illegal, but pronounces, at the same time, his indemnity, and that of all officers having aided in it. The consequence was the resignation of Lord Durham. See his proclamation of October 9, 1838, in which he gives his reasons for resigning, and his opinion of the indemnity bill.

Where there are written constitutions, above the whole legislature, the case, of course, is different. Nevertheless, laws of exception were passed in France under the elder Bourbons, after their restoration. The charter, as amended in 1830, says in article xiii., that the king has not the power either to suspend the laws themselves, or dispense with their execution.

Inasmuch as a bill of indemnity involves the supposition of a preceding illegal act, for which the ministers ask indemnity, none could be passed in America, for it would be suspending the constitution.[13] If Congress take any notice of acts, considered by many as illegal, they can do nothing except declare by resolution, that the two houses hold them to be lawful, or, in the contrary case, impeach the respective officer.

[13] Upon this point, see Additional Note M. on Constitutional Construction, etc.—Ed.

mental law, of constantly appealing to the first and original sovereign power, and of building upon the principles which preceded the laws, constructions to supersede them. Yet that which is dangerous cannot, on this account, be always avoided. This is true in common ethics; and not less so in political. The only safe way respecting conflicts and collisions, seems to us boldly to approach and investigate them, and to try to establish rules which shall guide us even in their mazes. The more perplexing the case, the greater the necessity to trace out its elementary, component parts and principles. Without this we shall be led to pedantry instead of truth. It is far easier indeed to establish a few general rules and to pedantically adhere to them, even in cases of conflicts, than to do what is essentially right and unequivocally true.

4. Extravagant construction is that which carries the effect of the text beyond its true limits, and, therefore, is not any longer genuine construction, as the last named species becomes of a more and more doubtful character the more it approaches to this. The difference between the two is this, that the former remains, in spite of its transcendency, within the spirit of the law, or document to be construed; whilst extravagant construction abandons it. That the attempt, by mal-construction, to carry designs into the sphere of an instrument which are not contained in it, amounts to the same with carrying the effect beyond its limits, is clear.

The report to Charles X., king of France, made by the whole council of ministers, presided over by Prince Polignac, July 26, 1830, recommended to the king the annihilation of an essential part of the constitution, namely, the

liberty of the press, guaranteed by article 8, of the charter; and founded this recommendation on the power, committed by the same charter to the king, of watching over the safety of the state, and the maintenance of that very charter which the ministers called a "return to the constitution." It was considered by the nation at large as an extravagant construction of the fundamental law, and the "July revolution" ensued, which not only overthrew the administration, but dethroned, likewise, the reigning family. The history of England, especially under the Stuarts, records many extravagant constructions, and instances are not wanting in the history of the United States.

Thus the very idea itself, of the state, has been extravagantly construed; for instance, when individuals were secretly despatched for, what was called, reasons of state. Yet the chief idea, upon which the state is founded, is the safety of its members. From what we have said of the natural and essential character of power, it will naturally lean towards extravagant construction. It cannot help doing so, by its very nature.

CHAPTER IV.

Principles of Sound Interpretation — Genuineness of the Text — Falsified Texts in the highest as the lowest Spheres — No Sentence of Words can have more than one True Sense — Double Interpretation is False Interpretation — Good Faith and Common Sense the leading Stars of all Genuine Interpretation — Moral Obligation of Legal Counsel — Lord Brougham's Opinion — What Good Faith is in Interpretation — Peculiar Circumstances which may make Subterfuges laudable — Literal Interpretation an ever ready Means of Tyranny — Political Shuffling — Words to be taken in their most probable Sense — Usus Loquendi — To what it may relate — Rules to ascertain the Meaning of doubtful Words — "Contemporanea expositio est fortissima in Lege" — Instances — Technical Terms to be taken in their technical Sense — That which is inferior cannot defeat that which is superior — The Text itself must furnish, if possible, the Means of interpreting its own doubtful Words — High Considerations on account of which we have to abandon Interpretation — Case of Lord Bentinck's Order in Council, abolishing Whipping of Native Indian Soldiers, and a Sepoy and Drummer being lashed, because, having become a Christian, he was not entitled to the Privilege of Natives — Case of Sir Thomas Parkyns — Recapitulation of the Principles of Interpretation.

I. We shall now examine the fundamental principles of every sort of interpretation, applied in whatever branch, to whatever text.

In the first place, interpretation must begin with what is likewise the first rule of criticism. We must convince ourselves that the text be genuine, that is, that it have proceeded from the utterer from whom it purports to have proceeded, or from whom others assert it to have proceeded; or that it belongs to that period, at which it is maintained that it originated. This is a rule of paramount importance in all departments, and not the least so in

politics, whether it refer to documents issued by the highest authority, or to reports of speeches, or to conversational sayings of a political character.[1] Frauds of the most surprising character have been practised in altering and falsifying texts, or palming entirely spurious ones upon the public. They are daily committed, as to letters and speeches, with flagrant boldness; laws have been interpolated, fictitious charters and decrees produced, wills materially changed, or spurious ones substituted, and grants of whole provinces fabricated.

The Isidorian Decretals, a collection of papal ordinances and resolutions of the councils of the church, first made by Isidore, archbishop of Seville, who died in 636, and afterwards enlarged in the ninth century, many of which are of great importance respecting the papal government, have been proved to contain not a few spurious ones.[2]

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[1] It would seem as if, with the care taken to verify the acts of modern legislatures and their publicity in print, no need could ever arise of this branch of interpretation, so far as they are concerned. But if English and American lawyers are free from the necessity of collating manuscripts, and restoring, by conjecture, corrupt texts, as the civilians must still do, they have their own difficulties to deal with. Three statutes which had been repealed by 1 & 2 Vict., c. 48, were solemnly repealed again by 21 & 22 Vict., c. 26. In 1842, the Court of Queen's Bench, in the case of Regina *v.* Great Western Railway Company, listened to much argument and delivered an elaborate judgment upon 2 & 3 Edw. VI., c. 24, little suspecting that it had been repealed by 7 Geo. IV., c. 64, § 32. And see other examples of like kind in Holland's Essays upon the Form of the Law, p. 156.

On the other hand, the Supreme Court of Iowa, in Black Hawk County *v.* Cotter, 32 Iowa, 125, held, on solemn argument, in 1871, *per* Cole, J., that the County Court had not a power which had been expressly given it in 1864 by a statute of the Tenth General Assembly, chap. 75, § 1, overlooked by both counsel and court.

Upon the lack of authenticity and doubtful genuineness of many early reports, especially those printed about the middle of the seventeenth century, see Wallace's Reporters, Introduction, §§ 10–15.

I am not aware that any one has ventured to raise a similar question upon any part of the Year-Books. Few examine them carefully enough to form an independent judgment nowadays upon the subject. But those who have had occasion to trace their references from one book to another, will not form a very high notion of their accuracy. For example, take the oft-quoted case of Sibyl Belknap, as to which see Additional Note P. — Ed.

[2] A very full account of the pseudo-Isidorian Decretals, with some other forgeries of the same nature, by a candid and learned Catholic writer, will be found in Walter

So at least all protestants, and many catholics, are convinced.

Luther declared that first of all he must be convinced of the genuineness of the bull issued against him, in 1519, before he could take any step, for it was well known, he said, with what brazen boldness papers had been produced, in his time, said to have been issued under papal authority, but which, nevertheless, proved to be spurious.

The Emperor Napoleon proclaimed, in 1810, the concordate, which he was anxious to conclude with Pius VII., then retained at Fontainebleau, as having been finally ratified, and, consequently, henceforth to be observed, as law of the empire, while the pope declared it to be void, and not to have been finally ratified.

During the late election struggle for the first parliament under Queen Victoria, a most arduous one between the whigs and tories, entire electioneering letters, purpor ing to have come from some of the highest persons in rank, went the rounds of all the papers, which nevertheless were soon after absolutely disavowed and declared, by their alleged authors, to be, from beginning to end, base fabrications.

In 1850, the Paris papers contained the declarations of two persons, signed by their names, concerning certain avowals pretended to have been made by General Cavaignac, regarding the prolongation of President Bonaparte's office, and the general's readiness to resort to civil war under certain circumstances — all which allegation was afterwards proved to be absolutely false.

Lehrbuch des Kirchenrechts, §§ 95, 99 (pp. 184, 213 of 9th ed., Bonn, 1842). The notes contain very full references to all the authorities on the subject.

That reports of speeches, however honestly made, require this kind of criticism in a peculiarly high degree, is a matter of course.[3]

II. No sentence, or form of words, can have more than one "true sense," and this is the only one we have to inquire for.*

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* Amphibolous sentences are such only with reference to the words, grammar, &c., in short only with reference to form. He that uttered it can have meant but one thing or nothing. A sentence may be, and very many are, amphibolous, for the persons addressed or the reader, but it cannot be such for the utterer. It is the same respecting drawings or hieroglyphics. A Lion may signify power, or Royalty or Generosity, but the scribe must have meant, in using it, one or the other, or he actually meant it as a generic sign for, say, all that's noble. In this case the sign answers our use of the indefinite article *a*, *e.g.* you shall send me a horse. This sentence has not several meanings, but means only send one of your horses; no matter which.

[3] In 1876 President Grant made a short speech at Des Moines, Iowa, at a meeting of his old comrades of the Army of Tennessee, which attracted great attention through the country on account of a passage in it which seemed to denounce all public support of educational institutions above the grade of common schools. It was afterwards ascertained that the passage, as it stood in his original manuscript, had no such meaning, but that it had been ingeniously altered between the time of delivery and its transmission to the newspaper office for publication. As published, it read as follows, the words and letters in brackets being the interpolations which gave it a false sense:—

"Resolve, That [n]either the State or nation, [n]or both combined, shall support institutions of learning [other than those] sufficient to afford to every child growing up in the land the opportunity of a good common-school education, unmixed with sectarian, pagan, or atheistical tenets."

The evidence of interpolation was threefold. These bracketed words and letters were not (1) in the lithograph of a photograph of Grant's manuscript (see Des Moines *Register* of February 15th), or (2) in the printed report of the secretary of the society before which the speech was delivered (see Gen. Dayton's Report, p. 82), or (3) in Grant's manuscript itself, which was examined in the White House very soon afterward (March 6, 1876), by W. Flint, Esq.

The forgery was largely discussed in the Iowa press of the time, as it occurred contemporaneously with an attack in the Legislature upon the State University, led by the individual who was the president's host at Des Moines.

The editor is indebted for the above facts to Prof. L. F. Parker, of Iowa City, one of the editors of the *Common School*, published at Davenport, Iowa.

A garbled extract from G. W. Featherstonhaugh's "Tour through the Western and Southern States" was published in the presidential campaign of 1844, containing

This is the very basis of all interpretation. Interpretation without it has no meaning. Every man or body of persons, making use of words, does so, in order to convey a certain meaning; and to find this precise meaning is the object of all interpretation. To have two meanings in view is equivalent to having no meaning. The interpretation of two meanings implies absurdity. Even if a man use words, from kindness or malice, in such a way that they may signify one or the other thing, according to the view of him to whom they are addressed, the utterer's meaning is not twofold; his intention is simply not to express his opinion. Simple and clear as this position is, yet have men frequently abandoned it, and history gives us many accounts of melancholy effects in consequence. The wicked idea of a mental reservation is chiefly founded upon the abandonment of this simple principle, nor has this simple principle been always acknowledged in law. In cases of slander, it was formerly held that words spoken admitted a double interpretation, the *asper* and the *mitis*. The former was used to interpret slanderous words of inferiors against superiors, of unprivileged against privileged persons; for instance, of commoners against peers. And how *asper*, indeed, did the star-chamber make use of this deviation from common sense! And not only in cases of slander, but when a tailor had annoyed a peer by dunning him, when a commoner had said of a peer that he was no better man than himself! Had the principle been that the same

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an interpolated slander upon Mr. Polk, the Democratic candidate, and credited to a "tour" made by an imaginary German named Roorback. It had a rapid run through the party press opposed to Mr. Polk, but was soon exposed, and its only effect was to add the term "roorback" to the political vocabulary. See Bartlett's Dictionary of Americanisms (4th ed.), "Roorback," p. 535. — ED.

words used against some persons are more punishable than used against others, the case would have been different. This principle is acted upon everywhere. The Prussian code gives the right of disinheriting a child for having used bad names against the parent. Disrespectful words against a judge on the bench are far differently punished from what they would be if directed against him in common company. But the principle actually employed in the instances before given was that of double interpretation; in short, interpretation was mistaken for the act of bringing a sense *into* the words, instead of acknowledging, as its sole legitimate office, that of bringing *the* sense *out* of them. It is this mistake alone which has actually produced with many persons so strong an aversion to the very word "interpretation."

The fictitious law case, composed by Pope and Fortescue as having ensued in consequence of Sir John Swale having bequeathed to his friend, Mr. Stradling, "all my black and white horses," when there were found six black horses, six white ones, and six that were black and white, or pied horses, is certainly entertaining. Yet the question, as it was stated by those gentlemen, "whether the pied horses were included in the legacy," ought never to have arisen. As there can be but one meaning attached to any sentence, the testator could not have meant by his words all black and all white horses, and, at the same time, all black and white horses. The only difficulty arising from this will could be this; whether the testator meant to bequeath to Mr. Stradling all black and all white horses, *or* all black and white horses.

Nothing is more frequent, in tyrannical governments,

than that the same law is made, according to the purposes of determining each single case, to mean all black and all white horses, and, at the same time, all black and white horses. Laws are made political see-saws; for the indelible moral nature of men forces even a tyrant, to prefer, as long as possible, the protection of the law; nay, rather the mere pretence of protection by the letter, the very shadow of the law, to the bare and bold confession of power alone, as the sole basis of his demands.

III. In no case of human life, in which we are called upon to act, to apply rules or to understand what others say, can we dispense with common sense and good faith,* but they are peculiarly requisite in interpretation, because its object is to discover something that is doubtful, obscure, veiled; which, therefore, may admit of different explanations.[4] If, without common sense, we may make even of strict syllogism an instrument, apparently, to prove absurdities, how much more are those two ingredients of all honesty necessary in interpretation. Common sense and good faith are the leading stars of all genuine interpretation. Be it repeated, our object is not to bend, twist, or shape the text, until at last we may succeed in forcing it into the mould of preconceived ideas, to extend or cut short in the manner of a Procrustes, but simply and solely to fix upon the true sense, whatever that may be.

It has been mentioned already, that the species of interpretation which was called predestined is, under

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* See Pol. Ethics, vol. i. book i. ch. 6.

[4] Compare, however, what the author has said in Chap. I. on the necessity of interpretation in all cases where language is employed. — Ed.

certain circumstances and with certain limits, allowed to be used by legal counsel. But they must take heed that they do not injure, in so doing, the peace and safety of others. It would be absolutely immoral, if a counsel, by artful interpretation, were to throw plausible suspicion upon an innocent individual; that, however, which is absolutely immoral, cannot, under any circumstances, be admissible. Knowingly to rob a person of lawful property, by artful interpretation in favor of the client, will be declared by the conscience of every lawyer to be immoral. Yet to fix the precise limit between the demands of public justice in countries in which it is believed that civil liberty depends in a great measure upon the fact that the court be entirely neutral, so long as the case is debating, and where it does not, therefore, direct the eliciting of the whole truth, even from the prisoner, and where there is the grave duty of the counsel to do every thing in favor of the client, on the one hand, and, on the other hand, the stern demand that justice be done in reality, and not in appearance; that the innocent be not injured; that morality be not compromised; the fact that courts are established by society for society, for the sake of justice, not to be arenas for the dialectic skill of disputants — to fix the precise limit between these two grave demands of liberty and justice, is one of the most difficult subjects in the whole range of political ethics — a subject worthy of the highest and most fearless intellect, the purest honesty and humanity, and the profoundest as well as most extensive learning. It is a subject, the philosophic treatment of which is more urgently asked for, the more civil liberty is extended and the more when undefined notions, in regard to forensic ethics, seem

to be afloat. It seems sometimes actually as if it were thought that of all rational beings on the face of the globe, the advocate alone were absolved from all morality and ethic obligation. Though Lord Brougham, when he defended Queen Caroline, may have been urged to say far more in the warmth of pleading, than he would calmly maintain, it is, nevertheless, startling in the highest degree if such a man dares to assert that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty; and in performing this duty, he must not regard the alarm, the torments, the destruction, which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy fate to involve his country in confusion."*

If there be a person who does not see at once, how untenable this remark is, let him imagine, the then Mr. Brougham to have said, "it is the duty of an advocate to

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* Provided his speeches on that occasion are correctly reported in the Trial of the Queen of England, before the Peers of Great Britain, 2 vols. London, 1820. I do not know of a disavowal on the part of Lord Brougham; but if there exists one, should rejoice at its greater publicity. I repeat, that this remark may have been elicited by the cry of the tories, that the whigs used that occasion only to disturb the peace of England, a charge which came indeed with bad grace from those who had instituted the trial to satisfy the personal rancor of such a monarch as George IV., against their own conviction. The words of Lord Brougham have been, repeatedly, taken notice of, among others in an article on the License of Counsel, Westminster Review, LXVIII., January 1841, signed E.

save his client at all hazards, even should he bring shame upon his own mother." And why is this more frightful than what Mr. Brougham actually asserted? In short, he forgot, as we are all so apt to do, the object, and remembered the means only. Justice is the object of trials, and, for the better obtaining it, it is thought that counsel on both sides should state all that can be said; but the object is not to save every person. If so, we act very strangely in trying the person at all. But although different duties may devolve upon different individuals, and continually do so, still the final object and ultimate duty remains the same. The lawyer does not cease to be a citizen, nor cease to be a man, and all the fundamental obligations are the same for him as for all others. I doubt whether ever a bolder assertion has been made in the most fanatical periods respecting the obligations of propagating true religion, and extirpating heretics. The simple question Why? puts the whole assertion to naught. As to separating the duty of a patriot from that of advocate, it amounts to words, and words only. Moral obligations are eternal and immutable, though the acts, which the same obligations require, may differ in different situations. If it is a duty to be patriotic at all, we can no where be absolved from it, although patriotism may demand different acts, in time of war, from an only son, who supports aged persons and minor sisters, and from a son of a hale and healthy father, or a man who stands single in life.

IV. Good faith in interpretation means that we conscientiously desire to arrive at truth, that we honestly use all means to do so, and that we strictly adhere to it,

when known to us — it means the shunning of subterfuges, quibbles and political shuffling — it means that we take the words fairly as they were meant.[5]

Pope Sixtus IV. was bent on breaking down the Roman house of Colonna. He besieged the fortress of Marino, held by the Colonnas. One member of this family, the prothonotary Colonna, was a prisoner in the hands of the pope, who offered to give up the captive, if his family would surrender Marino. The offer was accepted, and the gates of the fortress were opened. On the other hand, the pope gave up the prothonotary, but — after having slain

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[5] The rule laid down by Cicero, *Semper autem in fide quid senseris, non quid dixeris, cogitandum*, is often quoted in this connection, to the great confusion of thought. For it is evident, from Cicero's own words, that the rule is one of ethics, determining what a man may think himself bound to by a promise in good faith, not one of law, regulating the enforcement or the interpretation of the obligation by others. Cicero gives, as an example of the ill-faith reprehended, the story of the captive who was permitted by Hannibal to go to Rome after the battle of Cannæ, upon an oath that he would return if not ransomed. He stepped back, after leaving the camp, on the pretext of having forgotten something, and afterwards claimed that the oath was fulfilled by this return. "And he was so in words, but not in fact," says Cicero; "but in a question of good faith, it is what you have meant, not what you have said, that is to be considered." De Officiis, Lib. I., c. 13. Throughout the entire work, Cicero fails to distinguish legal and moral obligation. Puffendorf explains this rule as meaning only that, where a party is free to bind himself or not, he is bound only so far as he intended to be, — in that sense a mere truism, — and then adds: "But such is man's nature, that the inner motions of his soul can never be known to others, and may not accord with signs and exterior acts. Still, it is absolutely necessary to determine, in a distinct and precise manner, to what each man is obliged, and what may be lawfully demanded of him. If it were allowed to take the obligations into which one has entered as he himself would have them, there is no one of which the effect might not be eluded by a claim that the party had in mind an entirely different thing from that understood by the other party. As our thoughts, then, are for ourselves alone, and external signs for others, reason requires that, when a contract has been entered into, the obligee should have the right to require of the obligor all that a right and natural interpretation of the signs made use of would give him." Puffendorf, Lib. V., c. 12, § 2. It is the intention of the party that binds him; but what that intention was is to be learned, not from his own assertion or understanding of it, but from the words or signs in which it has been clothed. And it is worth remarking here, that the original sense of the term *nudum pactum* was a pact or obligation, formed, or supposed to be formed, in the mind, but not as yet clothed with such words or signs as the law could take notice of and enforce. It is so used by Bracton. The common English use of the term for a promise without a consideration is of later date, and grew out of the action of *assumpsit*. — ED.

him. Allegretto Allegretti, Diari Sanesi, p. 817, gives the words of despair and the curse, against the faith of the pope and all that thus shall keep their word, into which the mother of Colonna broke out, when she lifted up the severed head. The instance given by Vattel (B. II. ch. XVII. 273) is well known. "Mahomed, Emperor of the Turks, at the taking of Negropont, having promised a man to spare his head, caused him to be cut in two through the middle of the body."

Cardinal Bentivoglio, papal nuncio at Brussels, about the year 1614, considered the possession of the fortress of Wesel necessary, because it appeared to him, the "Rhenish Geneva." Spinola besieged it, and it had to surrender. The capitulation stipulated that one thousand Spaniards should be garrisoned in the place; he put three thousand into it. The citizens complained of the infringement of the capitulation, when Spinola answered, that the instrument did not express that not more than a thousand soldiers should form the garrison.* Spinola was wrong, because his interpretation was not faithful, and he erred, besides, against another principle of interpretation, which will be stated farther below.† [6]

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* Gaf, Hist. of the Synod of Dort; Ludolf, Theatre I, 491, both in German.

† I add the following additional proof how strongly men try to deceive themselves by subterfuges, when they have not sufficient boldness plainly

[6] Those who maintain that the world does not advance in morals must find it difficult to explain the marked change which has come over its notions of good faith, and the basis of obligations, since the Dark Ages. It is certain that then men regarded themselves as conscientiously bound, or, on the other hand, as conscientiously acquitted, by processes which to-day would be contemptuously rejected as the merest quibbles or subterfuges. The jurisprudence of the Anglo-Saxon period, and even the Year-Books, are full of cases where a technical compliance with certain forms is the test of justice, utterly irrespective of the effect. The famous oath

V. The character, however, of the transaction to which the words, to be interpreted, relate may be so peculiar that

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to avow that they intended to cheat. Our age furnishes us with instances quite as surprising, in courts and in politics. Burton, Narratives from Criminal Trials in Scotland, London, 1852, has this passage: "The 2d of October, this year, the notorious thief and rebel, Alaster Macgregor, laird of Glentrae &c. was taken by Archibald, earl of Argyle, who, before he would yield, had promised to him to convey him safe out of Scottish ground; to perform which promise, he caused some servants to convey him to Berwic, and besouth it some miles, and bring him back again to Edinburgh, where he was hanged with many of his kindred the 20th day of January." Annals of Scotland, edited by T. Haig, I. 415.

The student may here be referred to the decision of all the judges of England, at Westminster, concerning the validity of the delivery of the list of jurors to the indicted person, *before* the time fixed by act of parliament, 7 Anne, c. 21, § 11. See Townsend's Modern State Trials, London, 1850, the trial of John Frost at Monmouth, in 1839, for high treason before Lord Tindal. There is an article on this work in the October number of Blackwood, which contains the decision of the judges.

of Harold is a marked illustration. The trick by which William of Normandy hid a mass of relics under the altar on which he swore, was evidently regarded by Harold himself, and by all his contemporaries, as imposing a weighty obligation. He would have felt little or no compunction in breaking a promise, or even in violating an oath sworn in the highest of all names. The notion of the times, that the obligation of an oath was enhanced by its repetition upon several altars, points to the same conclusion. So, all the rules of trial by ordeal make the result dependent upon the exact fulfilment of certain technical conditions. If these could be evaded without contradicting the outward expression of the rule, the claims of justice were equally satisfied. The legends of the saints, too, abound in anecdotes of the advantages they obtained over the devil, and sometimes even over the Deity himself, by verbal quibbles which, at the present day, would hardly rise to the dignity of a pun; and the significant fact is, that such stories were related and accepted without the slightest doubt of their perfect morality.

Every lawyer who has studied the earlier decisions upon pleading in our own law, or the contemporary works of the civilians, must have been struck with the same fact. The main object, on both sides, was to find expressions literally consistent with the requirements of the law, while evading entirely its meaning and spirit. The same ingenuity was employed later to explain away the force of slanderous words, — as, when it was held that "thou hast poisoned Smith" was not actionable, because the poisoning might have been unintentional. Miles *v.* Jacob, Hob. pp. 6, 268.

Leyser, Med. ad Pand. Supp. Spec. I., Tom. XI., p. 170, relates a case of a defendant, sued for libel in charging plaintiff with sodomy, who defended himself on the ground that he had used the words *in mitiori sensu*, as in Isaiah, iii. 9. This illustrates, also, what our author says in sec. XII. of this chapter, in relation to the use of tropes. — Ed.

we cannot withhold our approbation from, or disown to be fair, what in other cases would be justly termed subterfuge.[7]

German history gives a remarkable instance of this kind in the women of Weinsberg. After King Conrad had defeated, in 1140, Duke Guelf VI., in the battle of Weinsberg, this city was besieged, and soon reduced to the necessity of surrendering. The men were doomed to die. Upon this, the women implored Conrad to allow them, at least, to take away so much of their treasures as each could carry on her back. The request was granted; but when the appointed hour of their departure arrived, a long procession of women appeared, each carrying her husband. Duke Frederick, the king's brother, was enraged, but Conrad said: "A royal word must not be twisted;" and the faithful wives were now allowed to carry away their *other* treasures likewise. Raumer's History of the Hohenstaufen, Vol. I. p. 397. Some hypercritics have doubted the fact, but, according to this distinguished historian, unreasonably so.

Here, the fact that the proposition came from the women and that they made it purposely, in a manner that Conrad should be deceived, was decidedly against them, according to the principles of hermeneutics. There would not even

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[7] When the General Assembly of Scotland, in July, 1648, espoused the cause of the king, they did not propose to invade England, but only resolved upon "the endeavoring to bring his majesty, with honor, freedom, and safety, to one of his houses in or about London!" Plain Reasons for Dissenting, Glasgow, 1787, p. 296.

"To the soft words which cover sharp strokes of European diplomacy, like the velvet tissues around the claws of cats, must now be added the English noun 'protectorate,' as anybody will understand who reminds himself of the British protectorate over Cyprus, the protectorate of Austria over Bosnia, and the proposed protectorate of France over Tunis. Under the new application of the word, we must expect our dictionary-makers now to substitute for the old-fashioned meaning of the verb "to protect," a new-fashioned sense, meaning "to absorb," "to annex," or "to prey upon," the verb thus getting a kind of inverse meaning, like that of the Latin word for a grove, which was called *lucus*, because it was shady, and did not shine.' New York Evening Post, August 14, 1878.—Ed.

be claimed for them the rule of construction, which gives the benefit of doubt to the weak, or makes us incline in doubtful cases toward mercy; because the truth was, that according to faithful interpretation there was no doubt whatever, as to the meaning in which the women had been desirous that Conrad should take the word "treasure," in which he actually had taken it. Yet what generous soldier would not have granted them the full benefit of their praiseworthy subterfuge and noble deception?

Lately a flute-player advertised in an English town, that, between the acts, he would exhibit the extraordinary feat of holding in his left hand a glass of wine, which he would drink, though the six strongest men of the place should hold his left arm and try to prevent him from bringing the glass with it to his lips. Six stout men accordingly grasped his arm at the night of the performance, when he quietly advanced his right hand, took the glass, and quaffed the wine. Now, there are many countries in which "tricking the public" is punishable. Some judicial proceeding might have been the consequence; but though the flute-player evidently resorted to a quibble, he must have been acquitted; because his advertisement showed to every intelligent man, that his words could not be meant to be taken in a plain sense. There is no reason why the man should not have the benefit of his wit, if the public choose to be gulled. They took the true ground in the above case, and applauded the ingenious deceiver.*

* We have seen already, chap. II. iv. how necessary common sense is, to make the commonest intercourse among men a matter of possibility. Another instance is strikingly exhibited in the clown of the low comedy. The greater part of the jokes, by which these personages make the hearers

VI. That artifice, to which revengeful tyranny so often resorts to obtain its objects without incurring the direct charge of guilt, or to which a troubled conscience has recourse to appease its remorse, or which we use when we are anxious to throw the guilt from our shoulders, in cases of divided responsibility, is generally, in its essence, founded upon literal or unfaithful interpretation.

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laugh, rest on literal interpretation and the contrast between the sense which the spectator attaches to a sentence, and that in which the merry-andrew takes it. Almost the entire story of the far-famed Eulenspiegel is founded upon literal interpretation. Puns are generally nothing else. Nor does this contrast, and surprise caused by it, belong to the lower sphere only; the finest wit, the sweetest passages, as well as the most majestic, of a Shakspeare, often turn upon it. That touching anecdote of Pope Gregory the Great, meeting with enslaved Angles in the market of Rome, and the conversion of the British to Christianity, which was caused by it, is founded upon literal interpretation. Palgrave, in his History of the Anglo-Saxons, relates it thus. Pope Gregory chanced to see some beautiful Saxon boys offered as slaves, and he asked: "To what nation do these poor boys belong?" The dealer answered, "They are Angles, Father." "Well may they be so called, for they are as comely as angels; and would that, like angels, they might become cherubim in heaven! But from which of the many provinces of Britain do they come?" "From Deira, Father." "Indeed," continued Gregory, speaking in Latin, "De irâ Dei liberandi sunt." And when, on asking the name of their king, he was told it was Ella, or Alla, he added, that "Allelujah — praise ye the Lord — ought to be sung in his dominions."

But the object of law and politics is neither to amuse nor to touch; we must discard, therefore, literal interpretation.[8]

[8] It certainly was not the intention of the secretary of war, Gen. John A. Dix, in issuing his famous order of, "If any man hauls down the American flag, shoot him on the spot!" that every flag in the country should be kept flying night and day until worn out. Yet a literal interpretation of the order would imply nothing else.

It may be questioned, however, whether the term *literal* interpretation is justly used here. Such, certainly, is not the common understanding of it, except when witticisms or metaphors are the subject of interpretation. A literal interpretation in ordinary colloquial usage means very nearly what our author would express by the word Interpretation alone (as distinguished from Construction), without any qualifying adjective. See paragraphs X., XIV., in the text of this chapter. — Ed.

After the infamous Jeffreys had done all in his power, during the trial, to ruin Algernon Sidney, he declared, when pronouncing the sentence, that he had nothing to do with the matter, except to pronounce the law;* the jury had decided that Sidney was guilty of treason; and no doubt, had he himself been brought to trial when James was expelled, he would have used this as an argument for his defence.

The Spanish Inquisition never sentenced a man to die, for the church seeks not the death of men; it only declared the culprits to be heretics, and handed them over to the secular authority. If thought necessary, the heretic was burnt, the officers of the inquisition being present. Yet, as late as about 1822, it was stoutly maintained that the inquisition had nothing whatsoever to do with the death of any heretic.†

In these cases of political shuffling, which extends into all branches of politics, the deed is represented as floating, as it were, between the actors; each one having performed but a part, is free of responsibility; as if two men might commit an act of forgery between them, but each one remain not guilty of forgery, by having severally done an act, in itself and singly, lawful. This will remind the

* See Sidney's Trial, in the Memoirs of his Life, in his Discourses on Government, &c., 4to ed.

† The title of the book I have forgotten, but its two arguments were, first, as I stated, that political shuffling, and secondly, that the heretics in Spain were nearly all actual traitors, politically speaking — alluding to the poor Moriscos. It is the view which Mr. Capefigue, in his "Richelieu, Mazarin, la Fronde et Louis XIV.," Paris, 1835, 8 vols., seems to take. The only modern work of extent on the Spanish Inquisition, which deserves to be consulted as authority, is Llorente's History of the Inquisition.

reader of the thugs who had "holders of hands," "holders of feet," and those who stopped the breath of their victims, or of Sterne's two nuns who uttered a word very unbecoming between them, by each one pronouncing one syllable only, in order to avoid the guilt of swearing.

The memoirs of any man, who, high in power, has been desirous of justifying reproachful acts, will always be found replete with this shuffling on the ground of literal interpretation, for instance, the late Memoirs of Godoy, the Prince of the Peace, who was for a long time the actual ruler of Spain, in the name of Charles IV.

VII. Faithful interpretation implies that words, or assemblages of words, be taken in that sense, which we honestly believe that their utterer attached to them. We have to take words, then, in their most probable sense, not in their original, etymological, or classical, if the text be such that we cannot fairly suppose the author used the words with skill, knowledge, and accurate care and selection. Grotius says: *si nulla sit conjectura quæ ducat alio, verba intelligenda sunt ex proprietate, non grammatica quæ est ex origine, sed populari ex usu. "Quem penes arbitrium est et jus et norma loquendi."* De Jure Bel. et Pac. Lib. II. c. XVI. II.*

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* It is different, if our object is scientifically to settle which signification we ought to give to a word, if we write ourselves, not that which has been given by others, in common writing, or if we have to find out the signification a word had in former periods. In these cases, its etymology is frequently of much importance; for if it does not unfold to us the entire and present signification of a word, the origin and history of a word will, nevertheless, shed considerable light upon its signification in many instances. Etymology becomes especially valuable in settling the pre-

VIII. According to the character of the text before us, we are obliged to take words, either in their common adaptation in daily life, or in the peculiar signification which they have in certain arts, sciences, sects, provinces, &c., in short, we have to take words according to what is termed *usus loquendi*. Horse, in common language, means a common animal; in a marine insurance case, it might mean this animal or a certain part of the vessel; the connexion in which the word stands with others must give the decision. In a fire-insurance case, the same word might have an architectural meaning. In a criminal case, it might mean a cloth horse used in laundries; and in a military order it might stand for the word cavalry. If an officer had received an order to send 200 horse, and he were arraigned for disobedience, it would be an insufficient excuse were he to plead, that, the order being to send 200 horse, he did not know how to send them, since the men were not ordered at the same time. The word "horse" is frequently used in military language for a man with his horse. Thus the word "soul" stands frequently in statistical writings for individuals of the human species.

The general character of the text, whether it has emanated from a high or low source, and was drawn up with

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cise meaning of synonymes. Altogether, etymology is one of the means of arriving at the signification of a word, and must be used as all the others, with common sense and in good faith. Archbishop Whately says: "It is worth observing, as a striking instance of the little reliance to be placed on etymology as a guide to the meaning of a word (he ought to have said, absolute meaning; for etymology is, in cases, no mean guide to the comparative meaning of a word), that Hypostasis, Substantia, and Understanding, so widely different in their sense, correspond in their etymology." Whately's Logic, Appendix, ad verbum *Person*.

care or in haste, with a knowledge of the technical terms or not, the peculiar character of the author, and the especial connexion in which we find a doubtful word, must direct us in fixing upon a proper meaning.

IX. The *usus loquendi* may relate to a language in general, for instance, *femme sage* in French, which never means a wise woman but always a midwife — or *res* in Latin, which stands often for deeds — or *deed* in English, which stands often for a certain species of document. Or the *usus loquendi* may relate to a particular period, as *imperator*, which, at the time of the Roman republic, meant something different from what it signified during the empire; or the Greek πιστις which required[9] a different meaning with the Christian writers. The word obtaining means now, frequently, something entirely different from what it formerly did. Or it may relate to an individual author, thus Dion. Halicarnassus wrote on the idioms of Thucydides; or to a certain art or science, as we have seen above; or to a certain society, sect, &c.; or to a peculiar class in society, in a nation, for instance, the illiterate; or, finally, to a part of a country (*provincialisms*).

X. The chief rules in ascertaining the meaning of doubtful words, besides the general one, just given, that we are to take the words in that meaning which we may faithfully believe their utterer attached to them, (which word faithfully, however, does not imply our being carried away by personal feelings, violent dislikes, or conceited self-considerations,) are: —

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[9] *Required*. So in the former edition and in Dr. Lieber's corrected text, but probably a misprint or a slip of the pen for *a*cquired. — Ed.

To try first to ascertain the meaning — from other passages of the same text, in which the ambiguous word occurs, so used that it leaves no doubt — by parallels.

To ascertain it from other sources which we consider fully competent: thus, with regard to dead languages, from contemporary writers in the same language, or other contemporaries, who have chanced to explain the doubtful word, as Cicero explains several Greek words: with respect to living languages, from works or persons of the same nation, community, profession, art, &c., to which the doubtful word may relate, after these persons have established their character for competency and truth; from previous expounders, of weighty authority, who are known to have paid much attention to the subject, and have done it with patience, learning, shrewdness, and conscientiousness; and from scholia, glosses, versions, and commentators.[10]

To this rule refers the old maxim, acknowledged among others by Lord Coke: "Contemporanea expositio est fortissima in lege" — that is, as in all other cases, cum grano salis, as will appear more clearly from the sequel. We have in this particular to guard ourselves against an inordinate veneration of old authors, merely because they are old, or against a too implicit reliance upon old authors, simply because they have been relied upon so long. Science advances, and it would be a matter of great regret if successive centuries were unable to supersede by their labors some works of previous periods, though they

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[10] Upon this entire subject there is scarcely a higher authority or a more satisfactory exposition than will be found in Encyclopädie und Methodologie der Philologischen Wissenschaften von August Böckh, Leipzig, 1877, — a posthumous work of the great classical scholar. See especially pp. 79–255, on Hermeneutik and on Kritik. — Ed.

have justly enjoyed, and for a long time, the reputation of authority. See especially the chapters on Precedents and Authorities.[11]

We must be guided by the degree of care which common sense will oblige us to believe to have been bestowed upon the selection of words and their arrangement. It would be in accordance with genuine interpretation to take the same word in a wider or more restricted sense, or in an entirely different one, if we meet with it in an international treaty, from what we would had we the will of a private individual before us.

XI. The reader will find in this section, some instances, elucidating the preceding remarks.

In former ages, the students of the most frequented European universities were divided into various societies, called nations, which had their peculiar privileges, as there are to this day four "nations" in the university of Glasgow. Property was not unfrequently bequeathed to them; the word "nation," therefore, in a will containing such bequest, was to be taken in an entirely different sense from what would be given to it in a national treaty. Again, the various tribes of the North American Indians are frequently called nations, and, secondarily, the country they inhabit. In this peculiar signification, the word "nation" is often used in public documents of the United States relating to transactions with the Indians, for instance to their ceding of lands.

In the commercial treaties of the Unite States with

[11] Chapters VII. and VIII. of the text, *post*, and Additional Note (N) on Precedent, and the Nature of Authority in the Law. — Ed.

other powers the expression "American goods" is used. To give to this term the meaning of goods coming from any part of the continent of America, or its adjacent islands, would not be genuine interpretation.

The Tariff of the United States imposes a different duty upon manufactured articles of iron and on bar iron. A merchant in New York imported, in 1832, rolled iron, which the collector declared to be bar iron, liable to the heavier duty. The merchant claimed the benefit of the smaller duty, the imported article being, according to his opinion, manufactured iron. The question came before the proper court, in September of the same year, and witnesses, acquainted with the terms of the iron trade, were called to state whether the term "manufactured iron" applied to rolled iron or not. So, in another case, it was necessary to ascertain from credible persons, conversant with the subject, whether the term "old iron" was applicable to certain imported iron or not. Interesting, with regard to this subject, is likewise a case which attracted much attention, where it was decided by Mr. Justice Story, in the Circuit Court of the United States, that "loaf sugar," after being crushed, in which state it was imported into the United States, was not "loaf sugar" within the Tariff Act of the United States of 1816. See United States *v.* Breed, 1 Sumner R. 159.[12]

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[12] Although the revenue laws, tariffs, etc., of the United States are intended only for the collection of duties, and not for the punishment of crimes, (see United States *v.* Twenty-eight Packages, Gilpin 306), yet the rule of their interpretation is almost as favorable to the individual, as against the state, as that in relation to criminal statutes. Duties are never imposed upon citizens by doubtful interpretations. Adams *v.* Bancroft, 3 Sumn. 384. In cases of serious ambiguity in the language of a revenue act, or doubtful classification of articles, the construction is to be in favor of the importer. Powers *v.* Barney, 5 Blatchf. 202. — ED.

The constitution of Massachusetts provides that votes shall be given in writing. The proper officers, some years ago, had refused a printed vote, usually called a ticket. An action was consequently brought before the Supreme Court of that state, and it was decided that writing in this case included printing. See Henshaw *v.* Foster, 9 Pick. R. 318. This can only be founded upon the principle that the *usus loquendi*, with regard to the word "writing," has changed. There are, however, many who consider this interpretation decidedly what we have called an extravagant interpretation.[13]

A will made in the state of New York, and providing means for the foundation of a common school, must be so interpreted that it means a school according to the standard of those which are called common schools in that state, and not in Connecticut, Massachusetts, France, Prussia, or any other country

If the late Mr. Girard, of Philadelphia, directs by his will, that at least two millions of dollars shall be used for the foundation of an asylum for "poor male white orphans," the word poor is to be interpreted according to the views of the community of the time in which he lived; while the

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[13] But the Supreme Court of Vermont has decided in the same way with that of Massachusetts. Temple *v.* Mead, 4 Vt. 541. And the following passage from a recent treatise on Elections seems to fully vindicate these decisions from the author's criticism: "The term 'written' is held to include what is printed, — following the definition of that term as given by the best lexicographers, viz., 'to express by means of letters.' No doubt, to the common understanding the term 'written' conveys the idea of forming letters into words with a pen or pencil; but to give it this meaning, in this connection, would be to sacrifice the spirit for the sake of the letter." McCrary on the American Law of Elections, § 412.

Where a printed ticket has been changed by the voter, by erasing some part of it, or by writing on the face of it, or both, — in the phrase of politics, "scratching the ticket," — it has been held that the writing will prevail over the printed part, as the higher evidence of the voter's intention. McCrary, §§ 408, 409; The People *v.* Saxton, 22 N. Y. 309. — ED.

word "white" every one knows is used to indicate the descendants of the Caucasian race, whose blood has remained unmixed with that of Negroes, Indians, or that of any other "colored" race. The provision cannot be invalidated by the objection that no really white people exist. The word "orphan" must be taken in the sense in which it is understood by nearly all nations, namely, as meaning a fatherless child.[14]

In a similar way have others left money for the foundation of schools for "colored" people, meaning thereby negroes and mulattos. In some parts of the world, the term would signify people of mixed blood only, for instance, in the West Indies; while a court in New England would, perhaps, be obliged to include negroes, since this word, considered harsh, has given way, in a degree, to that of colored people, in that part of the Union. Again, if a testator should stipulate that a certain sum should be paid for the best chemical treatise on colorless blossoms, it would be sufficient to prove in court that colorless means green.[15]

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[14] For the application of this remark see Vidal *v.* Girard's Executors, 2 Howard (U. S.), 198. The great speech of Daniel Webster upon the Girard will is in vol. 6 of his works, p. 175.

[15] Illustrations of this kind might be multiplied almost without limit. A few may be added to those in the text.

Hugo (Geschichte des R. R. seit Justinian) says, in one place, of Ranconnet, that his name is upon no title-page, and in another that upon the title-pages of the books of others he is mentioned with great distinction.

Ein merkwurdiges Beispiel von einem für uns sehr wichtigen Manne, der auf keinem Titel-Blatte steht, und nie Vorträge gehalten hat, ist Ranconnet (p. 4).

Unter seinem Nahmen ist Nichts gedruckt, d. h., so dass er als Verfasser oder Herausgeber genannt wäre; aber auf dem Titel-Blatte der Bücher und in den Vorreden anderer ist er ganz ausgezeichnet geruhmt (p. 228).

There is no inconsistency between the two statements as thus made; but it is evident that the apparently simple and clear expression of a name standing on a title-page means two different things, so that it can be affirmed in one place and denied in another of the same man. The "land of promise" is a very familiar phrase, with a tolerably definite meaning, equivalent to the "promised land." But in the following passage from Knight's History of England it has quite a different meaning: "There was a wide gulf between the land of promise and the land of

In September, 1837, a case of considerable importance was tried in England, in which the question was, whether a steamship comes within the meaning of the act which regulates the London pilotage — an act passed when there were no steam vessels, claiming parliamentary attention.*

* My legal friends I trust will pardon me, if I quote here from the papers of the time, in lieu of better reference. The case came before Mr. Ballantine in the shape of an information against Capt. J. Anderson, master of the North Star steam-ship, who was charged with having, on the 14th of May last, acted as a pilot on board, after J. H. Bennett, a pilot

reality." Vol. VIII., p. 62. The metaphor here would be meaningless or absurd if the promised land were meant; since that, of course, must be the same land which is to be enjoyed in reality. Consequently, we must interpret the term to mean the land in which the promise is given, or, dropping the metaphor, the condition of promise as contrasted with fruition. What kind of interpretation shall we call it that gives or explains this meaning?

The extent to which the meaning of very common words may be affected by the matter to which they are applied may be seen by an extract from a well-known work.

"Happening to prove fatter or more lean than had been reckoned, the matter as put into metal overran or fell short."

No one but a practical printer could make sense of these words, I think, apart from the context, which would inform him of the general subject of which they treat, in Wallace's Reporters, p. 59.

"The invitation-cards which are issued on such occasions [a wedding feast given by the bridal pair, four days after the marriage] are stereotyped, and read very much as follows:" — Gray's China.

Does this mean that they are so executed, or that the form is an invariable one?

In writing the last line, I was about to conclude the sentence, "or that the form is set," when it occurred to me that this very expression is another ambiguous one, which might refer, according to the context, either to the mechanical execution or to the phraseology. So, we find illustrations of the need of interpretation from the context in almost every thing said or written, when our attention is once directed to the search.

The word "easterly," when applied to a current of water, means flowing *to* the east; when applied to a current of air (a wind), means flowing *from* the east. So, also, "westerly," and all the other adjectives of the class.

"The general easterly drift of that region of the Atlantic, which is kept up by the prevalence of westerly winds." Dr. W. B. Carpenter, in Encyclopædia Britannica (9th ed.), vol. III., p. 20, art. "Atlantic."

Any number of examples might be added, if it were worth the while, of the various meanings which the same word has acquired in different languages, or even in the same language. It was long ago remarked that—

"Old *priest* is but new *presbyter*, writ large," and every student of his mother-tongue knows that *to blame* and *to blaspheme* are the same word.

Gift, in German, is undoubtedly the same word etymologically as in English, yet it means a poison. — Ed.

If the testament of a Spaniard, or a law in Spain makes use of the word "Christian," there can be no doubt that the judge is bound to take the term as synonymous with a Christian who professes the Roman Catholic religion; for the word *cristiano* is never taken in that country in any other sense. Suppose, however, the word Christian is used in the United States, it would be against the rules of interpretation and good faith to allow one sect to exclude another, on the ground, that the latter does not follow orthodox doctrines. Sects, in their zeal, may deprive each other of the name derived from the common founder of our religion, professed by all, and make specific points, *e.g.* a belief in the Trinity, a test of the applicability of the name of a Christian, but the interpreter would have no right to exclude Unitarians as long as they call themselves Christians, profess the bible, are enumerated by every statistical and geographical writer among the Christian sects, and are considered as Christians by every one in

duly licensed by the Trinity-house, had offered to take charge of the steamer; whereby the defendant had forfeited the sum of £15 16*s.* 9*d.*, being double the amount of the sum which would have been demandable for the pilotage of the ship. — Mr. Ballantine referred to the Act, and said he was of opinion that steamers ought to be exempt by the common sense of things. Pilots had to receive a certain education before they were licensed; but, however expert they might be in conducting sailing-vessels, it might require a different degree of skill to conduct a steam-vessel. A pilot superseded a master in the command of a ship, and the master of a steamer, it must be supposed, was appointed because he understood the nature of the engines and machinery. He did not understand how the new science was to be engrafted on the ancient custom. However expert a pilot might be as a seaman, he might be a very bad engineer. The complaint was then proved, and as the Act left the magistrate no discretion, the captain was fined in the penalty above stated and costs.

common life, whose judgment is not influenced by sectarian excitement. Theology has not to decide the point, if we have to interpret the word for purposes not lying within the province of divinity.

I do not know on what particular ground the judges of England decided the suit of the Attorney General of England versus Shore, in July, 1834, according to which the management of an estate left by a Lady Hewley, in trust, to support "godly preachers of Christ's Holy Gospel," was taken from Unitarians, as not coming within the meaning of the bequest, but if the decision was made merely on the ground that they do not believe in the Trinity, in the same manner as most other sects do, or as the dissenters in England do, Lady Hewley having been a dissenter, it seems a surprising decision.* Lady Hewley lived at the time of Charles II

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* Substance of the speech of Charles Purton Cooper, in the suit of the Attorney General *v.* Shore, instituted in the High Court of Chancery, respecting Lady Hewley's Foundations, Wednesday, July 2, 1834, 2d edit. London, 1834. In 1842 the house of lords gave a final decision, confirming the decision of the Vice-Chancellor and the Lord Chancellor. Mr. Justice Erskine observed that those who denied the Trinity were in Lady Hewley's time considered blasphemers, and therefore they could not be intended by the term "godly preachers." Mr. Hallam, the historian, wrote to the author, concerning what the latter had said of the case in the former edition of this work that he was mistaken, and that no one in England doubted the correctness of the court, the house of lords not having then decided. I cannot help adding that if the reason given by Justice Erskine were tenable in its whole breadth, as he states it, it would lead to surprising ends. Suppose a will made 300 years ago provides for a distribution of money among those who suffer from want, is the standard of comfort of that time to be taken without any reference to the changed standard of comfort. Can no tea be given to those "in want"? It is now given to paupers.

I will give one more instance, which seems to me strikingly to illustrate some remarks which have been made above. Several acts of parliament regulate the lineal measure of Great Britain; the last of them, 5 George IV., c. 74, settles the length of a foot, in such a manner as to do away with all doubt, by enacting the precise proportion which a yard is to bear to a pendulum vibrating seconds in the latitude of London. It is 36 inches to 39.1393. Nothing can be clearer. If an act of parliament, therefore, uses the terms yard, rod, furlong or mile, it would seem that no doubt as to their exact meaning can any longer exist. Yet the reform act declares that the residence of freemen, who have a right to vote at a place called Maldon, should be restricted to seven miles from the town hall. The important question arose: Are these seven miles to be measured by the road, or in a straight line over hedge and ditch? If the latter, fifty or sixty more voters belong to Maldon, and as matters stood during the election of 1837, a candidate would have obtained a seat in parliament, directly opposed to the one who must have been returned, if the other interpretation had been adopted.*

XII. If technical terms, belonging distinctly to the terminology of an art or science, are used as such, the same good faith demands that they must not be taken in their common but in their technical sense, as has been mentioned already.

Corresponding to this principle is another, that tropes be taken as tropes, and direct expressions as direct.

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* British Papers of October, 1837.

This rule, a deviation from which has caused great calamities, is generally of easy application in politics or law, yet not always. A clergyman who leaves a portion of his property "for the greatest improvement of his flock," will be understood to mean by flock the aggregate of his parishioners. A minister, however, convinced that no greater benefit could be bestowed upon his impoverished congregation than the improvement of their sheep, by importing a merino ram, had with great expense and infinite trouble, succeeded in obtaining one. For the last fifteen years he had bestowed the greatest care upon the improvement of his sheep to set a good example, and to assist his parishioners in improving theirs. When he died it was not easy for his executors, whom he directed by his will to use a considerable proportion of his property for the "greatest improvement of his flock," to decide whether the testator had used the word in a tropical sense or not.

The previously mentioned instance of the New England farmer leaving a legacy for the benefit "of the poor of the household of faith," is likewise in point.

XIII. The special, particular and inferior, cannot defeat, or intentionally militate with the general and superior. If, therefore, we may attach two or more different meanings to a sentence, that is the true one which agrees most with the general and declared object of the text.

The late Mr. Girard specifies very minutely how his orphan asylum is to be built; but the architects have since declared that some of his directions cannot possibly be executed without great injury to the building, or danger to

its inmates. It would be absurd to suppose that the testator was desirous of defeating the general object, *i.e.* the erection of an orphan asylum, by a specific direction, namely, that of architectural details, and consequently this portion of the will must be set aside, as of no effect.

When the particular, however, thus evidently defeats the general, whether in part or entirely, we have to resort to construction, in order to obviate the difficulty.

By way of exception, the specific may be contrary to the general, but it must not be forgotten, that exceptions are made on a ground still more general than the general object of the text; the rule, therefore, just given, is perfectly correct.

The inferior officer has to obey the superior, but if the former is convinced that the latter is committing an act of treason, for instance, by manœuvering so that the troops or vessel must be taken or defeated, or by surrendering treacherously a fortress, or striking the flag without cause, or avoiding fighting when necessary, the inferior officer has the right to resist; or, in case of urgency, to kill him, when there is no other remedy in the midst of battle. Why? Because general safety is a law superior even to military or naval discipline.

XIV. Since our object is to discover the sense of the words before us, we must endeavor to arrive at it as much as possible from the words themselves, and bring to our assistance extraneous principles, rules, or any other aid, in that measure and degree only, according to which interpretation becomes difficult or impossible (interpretation precedes construction); otherwise interpretation is liable to become predestined. Words have been used to express

the sense, and through the words, if possible, we have to arrive at it.

Ernesti most solemnly warns against the belief in a perpetual and direct divine assistance in understanding the bible, without an unremitted zealous endeavor to arrive at the sense of the *words*, by the rules of sound interpretation. He calls it the abuse of reason, for by so doing we carry our opinion into the bible, and do not keep within the limits of the word, *i.e.* are unwilling to learn and receive the true meaning.

It is similar with those who have their own notions of public welfare, and carry them into a constitution, instead of faithfully interpreting the instrument. There are many individuals with whom arguing upon public measures, or subjects of public interest, is out of the question; for speak to them about law, constitution, custom, interpretation, rules, or whatever you like, their invariable answer will be, what do I care for your letters! the people's welfare and plain common sense (by which, in this case, their own view is meant) are the only rules. They expect, by way of intuition, what the others expect by way of inspiration.

The more we apply to general principles, or opinions not expressed in the words, the less sure we can be, whether we understand the individual meaning of the text or not. The appeal to the motives[16] of the utterers is, in most cases, doubtful, in many, dangerous; because it lies in the nature of things that it must be difficult, or impossible, to arrive at them otherwise than from the words themselves, except when a general declaration has taken place.

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[16] See Note 14, part, p. 156.

XV. Having said thus much, it becomes necessary to make a remark, which perhaps more properly belongs to the subject of construction, but which may have a place here to avoid apprehension. We have seen that interpretation means nothing more than finding out the true sense and meaning. But it is not said that interpretation is all that shall guide us, and although I believe the remarks in the next preceding section to be correct, still there are considerations which ought to induce us to abandon interpretation, or in other words to sacrifice the direct meaning of a text to considerations still weightier; especially not to slaughter justice, the sovereign object of laws, for the law itself, the means of obtaining it. In this respect, interpretation is much like political economy, a highly useful science, yet, withal, its object is to ascertain the laws which regulate the physical existence of society, and there are subjects[17] superior to this. A war may not be advisable on simple grounds of political economy as to its nearest effects, and yet be urgently called for by all that is sacred to a nation, to mankind. This consideration is frequently forgotten by political economists, who, at times, write as if political economy had actually supplanted the science of natural law and politics.[18]

The following case seems to me so interesting in its

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[17] *Subjects.* In this case, as in that on p. 90, *ante*, I have felt bound to follow Dr. Lieber's own text, though there can be no doubt that he intended to write "objects." — Ed.

[18] It is always dangerous, and experience has often shown it to be ruinous, to regulate our conduct by arbitrary maxims, vague conceptions, or metaphorical expressions; and the higher our sphere of thought, or of action, the greater this evil becomes. Dr. Lieber, *De l'Idée de la Race Latine et de sa veritable valeur en Droit Internationale*, an essay published in the *Revue de Droit Internationale et de Legislation Comparée*, Tom. III., 1871, pp. 458–463. This essay is a vigorous protest against the exaggerated importance attached lately to the conception of *race* as a determining element in history. — Ed.

kind, that I feel warranted in stating it. When Lord Bentinck was Governor General of India, he abolished flogging in the native army — may his name be honored! — not having authority to do the same in the British army in the East. If a sepoy professes the Christian religion, he thereby becomes subject to the British military laws proper, evidently to raise him. But this case happened, which was thus stated in a Madras paper.

"A few months ago the following case occurred in the Bengal army: A Christian sepoy deserted from his regiment, returned shortly afterwards, was tried by a court-martial, and sentenced to be corporally punished. The commanding officer thought himself prohibited from confirming the sentence by Lord W. Bentinck's order abolishing corporal punishment in the native army. He referred the subject, however, for the opinion of the Judge Advocate General, who gave it as his opinion that the sentence was correct and might be carried into effect, as the General Order of 24th February, 1835, does not extend to Christian drummers or musicians (to which proscribed trade the unfortunate individual happened to belong), and only affects native soldiers, *not professing the Christian religion*."

Below, the reader will find the order of Lord Bentinck, and the interpretation of the Judge Advocate General.*

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* "FORT WILLIAM, February 24, 1835.

"The Governor General of India in Council is pleased to direct, that the practice of punishing soldiers of the native army by the cat-o'nine tails or rattan, be discontinued at all the presidencies, and that it shall henceforth be competent to any regimental detachment, or brigade court-martial, to sentence a soldier of the native army to dismissal from the

Now, even waiving the important principle of sound construction, that in cases of doubt, that which is most lenient must be adopted, (see farther below,) and it was surely no stretch of the subject to consider it a matter of doubt, the Judge Advocate General was wrong, because to be subject to English laws proper, was meant to be a benefit, and not to lead to the monstrosity that the profession of the Christian religion should entitle the sepoy to three hundred lashes, and defeat the other privilege which his darker color conferred upon him.*

Another interesting case in point is suggested by the trial of Sir William Parkyns for high treason in 1695, before Lord C. J. Holt, Lord C. J. Treby, and Mr. Justice Rokeby. He prayed to be allowed counsel, but was refused, because the Statute 7 Wm. III. ch. 3, allowing counsel to persons indicted for treason, did not go into

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service, for any offence for which such soldier might now be punished by flogging, provided such sentence of dismissal shall not be carried into effect, unless confirmed by the general or other officer commanding the division."

The Judge Advocate's letter was as follows: —

"Sir, — I have the honor to return the proceedings of an European court-martial, held in the 16th Native Infantry upon sepoy and musician John Dooming, received with your letter. I conceive that the prisoner Dooming was correctly sentenced to corporal punishment, and that Lieut. Colonel Tulloch might have carried the same into effect without any reference to you — the award not exceeding 300 lashes. The general order of 24th February, 1835, does not extend to Christian drummers or musicians, who are governed by the rules laid down in the Articles of War for the European troops. It only affects native soldiers not professing the Christian religion.

"G. Young, Judge Advocate General.

"16th April, 1836."

effect, till the next day after that on which he was tried. It was in vain that the prisoner quoted a part of the preamble, which said that such an allowance was just and reasonable. The reply of Lord C. J. Holt was, that he must administer the law as he found it, and could not anticipate the operation of an act of parliament by even a single day. Whatever may be thought of the correctness of Lord Holt's decision in point of law, no doubt can be entertained, that humanity required him to postpone the trial for one day, and thus give the prisoner the benefit of the act. Sir William Parkyns was convicted and executed. See his case reported at length in the thirteenth volume of the State Trials, Howell's ed.

XVI. That which is probable, is preferable to the less probable; the fair, to the unfair; the customary, to the unusual; the easy, to the difficult; the intelligible, to the unintelligible.

We have to follow the special rules of interpretation which have been given by proper authority.

Thus the Austrian code declares that the German is the original text, and shall be considered and referred to as such, in all interpretations and constructions of its translations into the several idioms spoken in the Austrian dominions.

We endeavor to find assistance in that which is near, before we proceed to that which is less so.

If we do not understand the word,[19] we try whether its

[19] It is not always necessary or desirable to begin interpretation with the meaning of each separate word. An entire phrase often has a definite and well-settled meaning, quite independent of the usual meanings of its component words. In such cases it would confuse, rather than explain, to attempt analyzing the sense

connection in a sentence will shed light upon it; if we do not succeed, we endeavor to derive assistance from the period; if this be unavailing, we examine the whole instrument or work; if that leads us to no more satisfactory result, we examine other writings, &c., of the same author or authority; if that does not suffice, we resort to contemporaneous writers, or declarations, or laws similar to that which forms our text.

What we have said before includes the rule, that we are by no means bound to take an ambiguous word in that meaning, in which it may occur in another passage of the same text; for words, as is well known, have different meanings in different contexts.[20]

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into as many parts as there are words used to utter it. The phrase or sentence is, in such cases, itself a unit, — the equivalent of a single word, — as may often be clearly seen by translating into a foreign language, or even finding a synonyme in the same.

For example: the phrase "to keep house" has a meaning quite different from any assigned to "keep" as a verb, and independent of any distinction between the very unlike senses of "house." And the phrase has changed its meaning, in the course of years, without any corresponding change of its parts. When used of a bankrupt, "beginning to keep his house" means something entirely different from the same phrase used of a new-married couple. Amos' Systematic View of the Science of Jurisprudence, quoting the Bankruptcy Acts, p. 209. — Ed.

[20] It has recently been laid down that "every word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another." *Per* Jessel, M. R., in Pigg *v.* Clarke, L. R. 3 Ch. Div. 672; 18 Moak's Eng. Rep. 754. If this be correct, it must follow that where the context does not supply another, the word must always be presumed to be used in its primary, *i.e.*, in a single meaning. This would contradict all that has been said of the changes of meaning in time, of the difference made by place or circumstances. Besides, in what sense is the word "primary" used here? Certainly not for the etymological, or original meaning. No one would confine the word "murder," in an indictment, to a case of secret killing. The word in question, in this very case, furnishes a good example of the difficulty of determining the "primitive" meaning. It is "family," and the M. R. says: —

"What, then, is the primitive meaning of "family?" It is "children;" that is clear, upon the authorities which have been cited; and, independently of them, I should have come to the same conclusion."

The authority referred to is Barnes *v.* Patch, 8 Ves. 604. But one of the counsel in the case cited four other authorities (Cruwys *v.* Coleman, 9 Ves. 319; Gregory *v.* Smith, 9 Hare, 708; Williams *v.* Williams, 1 Sim. (N. S.) 358; Snow *v.* Teed, L. R. 9 Eq. 622) to show that grandchildren also, and all lineal descendants, were included in the term "family;" and another counsel made it include daughters-in-law (citing

XVII. In recapitulating the elementary principles of interpretation, we shall find the following: —

1. A sentence, or form of words, can have but one true meaning.

In re Terry's Will, 19 Beav. 580). It is difficult to see in what sense any one of these meanings can be called "primitive," rather than another. Certainly, if the order in time is to be taken into account, the most comprehensive, rather than the least so, should be so considered. "Familia, in classical Latinity, means always a man's slaves. Generally, in the language of ancient Roman law, it includes all persons under his potestas; and the testator's material property, or substance, is understood to pass as an adjunct or appendage of his household." Maine's Ancient Law, p. 201. In connection with the last fact, it is curious that the only meaning given in Cowell's Interpreter, as peculiar to English law, is that of "a plough-land, containing as much as one plough and oxen can till in one year," while in Jacob's Law Dictionary (folio, 1762) the word is thus defined: Familia, signifies all the servants belonging to a particular master; but, in another sense, it is taken for a portion of land sufficient to maintain one family, etc. See also Blount's Nomolexicon, to same effect. For an entirely different meaning, again, we have only to refer to the Digest, where we read: "Feminarum liberos in familia earum non esse, palam est; quia qui nascuntur patris, non matris familiam sequuntur." Gaius, L. 196, D. de V. S. (50, 16).

An example of the same kind, in which, as our author says, "there are considerations which ought to induce us to abandon interpretation, or, in other words, to sacrifice the direct meaning of a text to considerations still weightier," occurs in the newspapers as these sheets are prepared for the press; and it is the better worth quoting, because it illustrates the principle from the ordinary business of the market-place, in which every one may see its effect. The following quotation is from the commercial report of the Des Moines *Register*, July 30, 1878: —

"One of the rules governing the inspection of grain in the city of Chicago reads: 'In case of mixture of spring and winter wheat, it will be called spring wheat, and graded according to the quality thereof.' This rule was passed to prevent the country shippers mixing spring grain with winter, the usual difference in the price of the two being from six to twelve cents per bushel in favor of winter. But on Saturday last spring wheat was worth just ten cents per bushel more than winter wheat for spot delivery at Chicago, simply because the market for spring is practically cornered. On Saturday morning a large amount of wheat was received in that market, and it was noticed that a great number of the cars contained a few bushels of spring wheat carelessly mixed in with the top layer of winter, so that when the inspectors were called upon to grade the same, they were obliged to grade it spring wheat, — absolutely reduce its quality, — but at the same time add about $40 to the value of each car-load! There was considerable dissatisfaction expressed, and, under any other circumstances, the shippers would not have been so particular about the rule being carried out so closely; but they found they had a good thing on the city chaps, and certainly made the most of it. Where the wheat was No. 2, of course it could be utilized by the shorts to fill their contracts, and in all probability receipts therefor would be a legal tender on No. 2 spring wheat contracts, for the reason that equity admits of filling a contract with a better article than the contract calls for."

One of the best and most general rules for finding out the intention of a person who uses a dubious expression is this: that where one signification of the word induces an injustice or absurdity, another signification is to be taken. *And this is the rule, even where the unjust or absurd signification is the primary and proper one.* Blackstone, Law Tracts, vol. I., p. 24. — Ed.

2. There can be no sound interpretation without good faith and common sense.

3. Words are, therefore, to be taken as the utterer probably meant them to be taken. In doubtful cases, therefore, we take the customary signification, rather than the grammatical or classical; the technical rather than the etymological — *verba artis ex arte;* tropes as tropes. In general, the words are taken in that meaning which agrees most with the character of both the text and the utterer.

4. The particular and inferior cannot defeat the general and superior.

5. The exception is founded upon the superior.

6. That which is probable, fair, and customary, is preferable to the improbable, unfair and unusual.

7. We follow special rules given by proper authority.

8. We endeavor to derive assistance from that which is more near, before proceeding to that which is less so.

9. Interpretation is not the object, but a means; hence superior considerations may exist.[21]

This leads to construction.

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[21] See Additional Note (1), on the Value of Formal Rules of Interpretation. — Ed.

CHAPTER V.

Construction is unavoidable — The Causes why — Instances — Analogy or Parallelism the main Guide in Construing — Rules of Construing — We begin with that which is near — Aim and Object of the Text — Preambles of Laws — Shall the Motives of the Utterer guide us? — How far? — "Lex Neminem cogit ad Impossibilia" — Texts conferring Privileges — Close construction necessary in construing Contracts — Construction of Promises and Obligations — Maximum and Minimum — That which agrees most with the Spirit and Tenor of the Text is preferable — Effects and Consequences of the Construction may guide us — Blackstone — Antiquity of Law makes frequently extensive Construction necessary — Habitual close Interpretation and Construction favorable to Civil Liberty — Words of a relative or generic Meaning to be taken in a relative or expansive Sense — Rules respecting this Point — The Weak have the Benefit of Doubt — The Superior Object cannot be defeated by the Inferior — Recapitulation of the Principles of Construction.

I. Construction is unavoidable.[1] Men who use words, even with the best intent and with great care as well as skill, cannot foresee all possible complex cases, and, if they could, would be unable to provide for them, for each complex case would require its own provision and rule; relations change with the progress of time, so that, after a long lapse of time, we must give up either the letter of the law, or its intent, since both, owing to a change in circumstances, do not any longer agree. If, notwithstanding all imaginable wisdom in the utterer, construction becomes

[1] Upon the distinction of construction and interpretation, see the next note and the Additional Note B. The author himself has remarked that the topics of this chapter run for the most part in parallel lines with those of the chapter preceding. Some of the editor's notes to that chapter are equally applicable to this; but of course it has not been thought worth while to repeat them, or even to make more than this general reference to them. — Ed.

thus necessary, it is still more the case under ordinary circumstances. Interpretation, seeking but for the true sense, forsakes us when the text is no longer *directly* applicable; because the utterer, not foreseeing this case, did not mean it, therefore it has no true sense in this particular case.[2]

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[2] But can construction, in the sense in which our author uses it, help us much further in such cases of omission, etc., where the text has no true sense? If, indeed, the term be used as a mere negative of interpretation, to denote the cases in which a conclusion is arrived at, independent of the words of the text, we may say that contradictions and omissions, and all kinds of defect in written laws, are helped by construction. But, in truth, this is no more construction *of the text* than it is interpretation. Such conclusions are drawn from external circumstances, and from that vast and vague body of rules known as common law; and in most instances the conclusions would be precisely the same if there were no written text in existence at all. In common speech, it may make little difference whether we apply the term construction to cases of this kind or not; but in a work treating *ex professo* of the subject, it is desirable to point out clearly that construction here implies a written text on which it is founded, as truly, though not so closely, as interpretation.

The true relation of construction to interpretation can hardly be determined, unless we have in the first place determined the general theory of law, a topic upon which, as is well known, our English and American authorities hardly furnish a discussion, much less a conclusion. If we adopt the theory of Blackstone, or any similar one, by which the law is, in its very nature, an uttered command given by a superior, then of course it follows that interpretation must, in all cases, be the first step to be taken, and that construction is only admissible when the written text fails to give a satisfactory meaning. And the practical result further follows that the presumption must always be in favor of a construction adhering as closely as possible to the written text; and further, that no rule not consistent with that text, or derivable from it, at farthest, by rules of construction, can have any authority whatever.

On the other hand, if we adopt the views of law recognized at the present day by the disciples of the historical school, according to which the common or unwritten law necessarily precedes the written, and exists by and of itself, prior to any formulation or amendment by the legislation of each state respectively, we must regard the relation of the two processes to each other as exactly reversed; for interpretation, depending entirely upon a written text, can only come into play when the law has been so formulated. Construction, on the other hand, instead of being the mere process by which we supply defects in a text, will appear in its true light as the determination of a rule of law upon scientific principles, from all the considerations and *data* by which we construct a rule of law in cases where no text has ever existed, — that is, by which we frame new rules of the common law in harmony with those already recognized.

It is true that, in the sense our author uses it, a distinction may be made between the construction of a written law and the construction of new rules and principles of the common law. In the latter case, *ex vi termini*, there is no written or formulated law to influence our conclusions. In the former, there is a written law, bearing in some degree upon the subject, but which has failed to regulate it, either because the particular subject was not present to the mind of the legislator, or because the terms he used were not apt to fulfil his purpose. Construction, in

By the charter of appointment of the hereditary lord high chamberlain of England he has a right to the dress worn by the monarch at each coronation, and in that dress this officer is to appear on the first court after that ceremony. And it is further the law of England that wherever the word "king" occurs in any law, the word "queen" is to be substituted when the monarch is a female, as, indeed the term "king's bench" changes instantly to that of "queen's bench" so soon as a woman succeeds to the crown. The present monarch is a queen; was the officer to appear in her majesty's dress? This instance has been taken on account of the glaring absurdity to which interpretation would have led; or, rather, interpretation was not necessary, because there is no dubious sense at all. The framer of the charter did not think of the case of a queen's coronation. The instrument itself, therefore, expresses

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our author's sense, therefore becomes, under this theory, the formation of a new rule of law from the general elements which shape the entire law of the state, with the additional condition only that the new rule shall also harmonize with that which has been already formulated and written in the text upon another portion of the same subject, or in an imperfect text upon the same subject.

In fine, the result of one theory is, that construction is a mere *succedaneum* for the defects of a written law, though dependent upon that law, and thus divided from mere custom. While, upon the other theory, construction is the higher process, framing a new law from the general principles of all law, with only the limitation above expressed; while interpretation is the inferior process of ascertaining the extent and meaning of the formula to which such a rule has previously been reduced in writing.

And this is the sense of construction which our author had in mind in defining the term as "the representing the entire whole from given elements by just conclusions." In some places he has not been consistent with this idea, as in treating of interpretation he has sometimes represented it as required only in cases of peculiar obscurity or difficulty; and thus departed from the first position assumed at the outset, that it was common to all language conveying thought. It is hardly surprising, when we consider the theories of law which were found in all our books, without exception, at the time Dr. Lieber wrote, that an author, not a jurist by profession, and not accustomed to trace legal principles to their logical results, should occasionally be led into verbal inconsistencies of this character; but the definition, already quoted, stands in the passage where the distinction between construction and interpretation is expressly laid down, and no doubt represents his deliberate thought upon the subject. —ED.

nothing in regard to this case; for impossible things are nowhere to be supposed; and there are very many things impossible, though not physically impossible. It was impossible for the lord high chamberlain to appear in petticoats. Ludicrous as this instance seems, there are many others, touching subjects of the highest importance, which are equally strong in their character.

It appeared in a case in London, in October, 1837, that there are five hundred acts relating to turnpikes and roads, many of which affect the jurisdiction over them and clash most seriously. Interpretation cannot lead us out of such mazes.

A contemporary periodical made, not long ago, the following remark respecting property left for public purposes, especially for schools and other institutions for education, if they prescribe particulars relating solely to the period of the foundation.*

"An adherence to original rules, when such rules are no longer applicable, owing to change of circumstances, is, in effect, to defeat the will of the testator. In the instance of private property, an individual, by a rule of law called the rule against perpetuities, is not allowed to fetter an inheritance beyond a life or lives in being, and twenty-one years afterwards; the average of which time has been calculated to amount to seventy years. For a longer time than this it cannot be conceived that the circumstances of a family can be foreseen; and, for this reason, the law gives the power to the individual in possession, at the expiration of that

* London Quarterly Journal of Education, No. XIX, article on Lieber's Girard Report.

period, to remodel the limitations of the property to suit the altered position of the family in society. Following this example, might not some very salutary regulations be laid down with regard to property given for public purposes? Nothing can be more absurd, than to adhere to the letter."

I proceed now, to the general principles of construction.

II. All principles of interpretation at all applicable to construction, according to its definition, are good and valid also with regard to construction, for the same reasons that they hold in interpretation.

The main aid and guide of construction is, as has been stated already, analogy;[3] understanding the term as explained in chapter III., iii., or rather, parallelism. Following a similar principle to that given in chap. IV., xiv., we shall find that, in use of parallelism, we have carefully to begin with that which is near, and proceed to that which is less so, according, only, as we find ourselves unable to construe without seeking means in a wider circle.

If we have to construe part of a speech, will, law, or constitution, we ought first to inquire whether we can construe it by way of analogy from the same speech, will, law, or constitution; if not, whether there are similar acts, &c., which have proceeded from the same authority If we have to construe commentaries, we have to try first whether we can draw any assistance from the commentaries or glosses of the same author, before we proceed to those of another; and before we seek for assistance in the

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[3] Upon Analogy, see Additional Note G.—Ed.

whole literature of the language, we ought to examine the commentators and writers of the same period. So the theologian, in order to interpret or construe a sentence of Paul, must first inquire, whether he can explain it from other parts of Paul's writings; if not, he must then inquire whether he can find assistance in other writings of the new testament; and so on.

There may exist, of course, some reasons why the interpreter or constructor should omit these links, as he would be obliged to do in cases where Paul quotes passages of the old testament, or uses words which have reference to the customs or rites of Greek paganism.*

The Austrian civil code, introduction, 7, gives this rule: "If a legal case cannot be decided, either by the words, or the natural sense of a law, it is necessary to refer to similar cases distinctly decided by the laws, (in this code,) and to the reasons of other laws akin to the doubtful case. If the case still remains doubtful, it must be decided according to the principles of natural law, applied to the carefully collected and maturely weighed circumstances." We have here the gradual extension of construction in concentric circles distinctly prescribed. See, also, the French civil code, 1161.[4]

III. In conformity with the primary rule, which directs

See Ernesti Institutio, parts I. and II. and his commentators, Ammon, Stuart, Terrot, &c., and Horne's introduction to the Critical Study of the Scriptures, vol. II. part II. Book II. Section I. and *seq.*

[4] "Toutes les clauses des conventions s'interpretent les uns par les autres en donnant a chacune le sens qui resulte de l'acte entier." Code Civil, § 1161.

All the clauses of a contract are to be interpreted by each other, so as to give each the sense which results from the entire instrument. — ED.

us to proceed from that which is near, to that which is less so, we have likewise to inquire first as to the aim and object of the text, before we apply to more general rules, reasons, or arguments; and as it is frequently impossible to learn the object of a law more clearly than by an inquiry into the causes which lead to its being issued, a knowledge of these causes is of the highest importance. See 1 Blackstone, 59. Indeed, the general principle, that anything, which we are desirous clearly to understand, must be taken with all its adjuncts — a principle of peculiar importance respecting precedents — would demand the rule just given.

The Prussian code, introduction, 46, says: "in deciding upon dubious cases, the judge is not allowed to substitute any other meaning for the laws than that which clearly appears from the words, their connection, with reference to the doubtful subject, or from the *next and undoubted* reason of the law." *

This is the reason why Mr. Bentham, in his Principles of Legislation, advises that no law should be passed without a proper preamble, stating the reasons and causes of the law. Still, preambles cannot altogether supersede construction,

* If I quote frequently from the Prussian code, and, perhaps, more so than from any other code of the European continent, it is simply because it is a fact, that far more patience has been bestowed upon it, in devising it, whatever may be our opinion of some of its details. The remarks of Mr. de Savigny in his work, 'On the Aptitude of the Present Age for Legislation and Jurisprudence,' translated by A. Hayward, Esq., of Lincoln's Inn, on the history of this code, the long time spent in maturing it, and a variety of means resorted to in order to perfect it, are worthy of perusal, though we do not agree with Mr. de Savigny on the main points, as to the subject of his work.

inasmuch as they themselves must necessarily be sometimes subject to construction or interpretation. Such as preambles have been so far, they are not always safe guides, nor are the titles of laws. See 1 Kent's Commentaries, Lect. XX. p. 460, and sequel.[5]

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[5] *The Preamble.* — Both in England and in this country, it was at one time a common practice to prefix to each law a preface, prologue, or preamble, stating the motives and inducements to the making of it; but it is not an essential part of the statute, and is now frequently, if not generally, omitted.

It is, strictly speaking, without force in a legislative sense; being but a guide to, and not the vehicle of, the import of the statute. And to what is it properly a guide? to the meaning of the enactment? No; but to the intentions of the framer, which is only the first stage on the road, in the construction of statutes. * * * The preamble, it has been elsewhere largely stated, is entitled to great consideration. 1 Story on Const. (4th ed.) 338. It is, indeed, that introductory statement (prooemium) to which both reason and authority point, for ascertaining the intention of the enactment.

"The preamble is properly referred to," says the American commentator, "when doubts or ambiguities arise upon the words of the enacting part. The preamble can never enlarge; it cannot confer any powers *per se.* Its true office is to expound powers conferred, not substantially to create them." Story, *supra*, 339.

In the laws of England, in doubtful cases, recourse may be had to the preamble to discover the inducements the legislature had to the making of the statute; but where the terms of the enacting clause are clear and positive, the preamble cannot be resorted to. Lord Coke considered the rehearsal, or preamble, a key to open the understanding of the statute; and it is properly considered a good mean for collecting the intent, and showing the mischiefs which the makers of the act intended to remedy. The civilians say: Cessante legis prooemio, cessat et ipsa lex; but English lawyers are aware how seldom the key will unlock the casket; how rarely the preamble is found to state, beside the primary occasion of the law, the full views of the proposer of it. A particular mischief is often alluded to that is soon lost sight of, — cessat prooemium; wider objects are embraced, and a general remedy provided. Dwar. on Stat. 503. See also Sedgw. on Stat. & Const. Law (2d ed.), 42-45, as to the effect of preambles.

Perhaps no better criticism upon preambles has ever been made than the often-quoted passage of Seneca, in his ninety-fourth epistle: "Non probo quod Platonis legibus adjecta principia sunt. Legem enim brevem esse oportet, quo facilius ab imperitis teneatur velut emissa divinitus vox sit. Jubeat, non disputet — non disco, sed pareo."

The laws of the Byzantine emperors are overloaded with preambles, persuasions, threats, and explanations of motives. Trendelenburg remarks, with justice, that the style of German legislation (and the same may be said with equal truth of other modern nations) has been chiefly injured by the Byzantine versions of the Roman law, by the verbose minuteness of professional style, and the patchwork of amendments with which all modern legislative bodies load their statutes. The style of the Twelve Tables, and, in great measure, that of the laws of Moses, is brief and positive. When the law gives its reasons, it invites the subject to weigh them. Its proper tone is plain command. Naturrecht, p. 170.

The *title* of an act (formerly called the rubric, from being written in red characters) was not regularly prefixed to statutes prior to the eleventh year of Henry VII. Legally, it was no part of the statute, and was intended only for convenient refer-

IV. We have seen already, that, in many cases, it is difficult to discover the motives which may have prompted

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ence,—a mere name for the act. It had, therefore, no "legislative import," and furnished no clear indication of the legislative intent. "It was a very insufficient and unsafe guide to assist us in ascertaining, even in the most general way, the scope and purport of the act." Dwar. on Stat. 500.

At the present time, more importance is attached to the title. Where the intention of the legislature is not plain, and resort must be had to construction, every thing from which aid can be derived must have its due share of consideration; and, in such cases, the title demands a degree of notice, especially when it has undergone legislative discussion and scrutiny, and the object is there clearly set forth. It cannot extend or restrain positive provisions in the body of an act, but, "taken in connection with what *are* acknowledged parts of a statute (which *it* is not), the title may slightly assist in removing ambiguities" (Dwar. on Stat. 501), mistakes (Nazro *v.* Merchants' Ins. Co., 14 Wis. 295), and doubts (Hadlen *v.* Collector, 5 Wall. 107), applying to acts of Congress.

When the constitution requires the subject of the law to be stated in the title, the title becomes a part of the law, and may be presumed to express the general intent of the legislature.

The degree of particularity with which the title of an act is to express the subject is never defined by the constitution, and rests in the legislative will. It is not necessary that the title specify all the details by which the objects of the act are to be accomplished. Many individual persons or things may be embraced within the same subject, but all must be minor parts of one general whole. Hence the title does not furnish an index of the legislative purpose, but, when there is any doubt, may be resorted to for assistance in reaching a conclusion, and may even control a portion of an act. Nazro *v.* Merchants' Ins. Co., *supra.* When the title is referred to in the body of an act, it should receive especial attention. Torreyson *v.* Examiner, 7 Nev. 19.

The fact that codifiers have placed a given provision under a particular head or title in their arrangement, which has been afterwards enacted, has no very strong influence in determining the construction of such a provision. At most, it only shows the opinion of the codifiers as to the proper classification. Battle *v.* Shivers, 39 Ga. 405.

As to definitions at the heads of chapters, and titles in codes, see The People *v.* Molyneux, 40 N. Y. 113.

Cases bearing upon this subject are referred to in Dwarris on Statutes, pp. 264, 500, 501, and in Sedgwick on Statutory and Constitutional Law, pp. 38, 517.

The following recent cases, in addition to those already mentioned, are especially worthy of attention: United States *v.* Fisher, 2 Cranch, 286; Blanchard *v.* Sprague, 3 Sumn. 279; Conner *v.* The Mayor, 4 N. Y. 293; Williams *v.* Williams, 8 N. Y. 535; The People *v.* McCann, 16 N. Y. 58; Brewster *v.* City of Syracuse, 19 N. Y. 116; The People *v.* Lawrence, 41 N. Y. 137; Cohen *v.* Barrett, 5 Cal. 195; Flynn *v.* Abbott, 16 Cal. 358 (holding constitutional provision directory); Connecticut Mutual Ins. Co. *v.* Albert, 29 Mo. 181; The State *v.* Miller, 45 Mo. 495 (holding constitutional provision mandatory); The Commonwealth *v.* Slifer, 53 Pa. St. 71; Stewart *v.* Kinsella, 14 Minn. 524; The State *v.* Squires, 26 Iowa, 345.

By the rules of interpreting statute-law, received in Scotland, an argument may be properly used from the title to the act itself (*a rubro ad nigrum*). The preamble, or narrative, of an act, which contains a recital of the inconveniences that had arisen from the former law, and the causes inducing the enactment, may be also of great use in directing a doubting judge. But the chief weight in the interpretation of statutes is to be laid upon the statutory words. Erskine's Principles of the Law of Scotland, vol. I., p. 9. — Ed.

those who drew up the text; but it is also dangerous to construe upon supposed motives, that is, such as are not ascertainable from the interpretation of the text. Every one is apt to substitute what his motives would have been, or, unconsciously perhaps, to fashion the supposed motives according to his own interests and views of the case; and nothing is a more ready means to bend laws, charters, wills, &c., according to preconceived purposes, than their construction upon supposed motives. To be brief, unless motives are expressed, it is exceedingly difficult to find them out, except by the text itself; they must form, therefore, in most cases, a subject to be found out by the text, not the ground on which we construe it.

The Prussian code distinctly declares, respecting privileges, that, "in doubtful cases, reference shall be had rather to the proper contents of the privilege (*i. e.* the instrument granting it) than to the motives specified in the first grant of the same." Introduction, Of Laws in General, 58.

V. No law, will, or document whatever, which forms the text, can be understood to demand impossible things. If a provision, or part of it, directly does this, that part, or that provision, is void, and not the whole, on that account.[6] Lex neminem cogit ad impossibilia.

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[6] "And not, on that account, the whole." This, of course, is to be understood with the qualification that all which depends on the impossible portion falls with it. If the performance of a condition becomes impossible, the effect of performance will fail, whether it be suspensive or resolutive. Thus, if the condition be precedent to the vesting of a right, and becomes impossible of performance, the right will not vest. But if the right be already vested, and the condition is to devest it, the right will stand when the condition becomes impossible. 2 Bla. Comm. 157.

Upon the maxim quoted, see Noy's Maxims (ed. 1870), p. 23; Broom's Maxims, p. 181, chap. 5. To the same effect is the maxim of Celsus (L. 185, Dig. L. 17), *Impossibilium nulla obligatio est.* — Ed.

A short time ago the Legislature of South Carolina passed an act, incorporating a bank, in which the day when the subscription books were to be opened and that on which they were to be closed were fixed. Before the act, however, finally passed, an amendment was made, which fixed the day on which the books were to be opened beyond that on which they were to be closed, without altering the latter. And so the act passed in the press of business. Similar mistakes have happened in England.

VI. Whenever the text, to be interpreted, bestows privileges upon some one or more persons (to the exclusion, therefore, of others), ambiguous parts are always to be construed in favor of the non-privileged, provided the object of the privilege be not thereby defeated. Common sense dictates this limitation of the constitution required by the commonest principle of fairness.

Those who are privileged are not farther to be favored than the instrument, granting the privilege, distinctly indicates. If a favor, or privilege, has been granted in consideration of some service done, or to be done, they must be considered as equivalents, and the matter as settled.

In addition to English commentaries on this subject, we mention here the Prussian code, introduction, 54, "privileges and exemptions must be construed, in doubtful cases, so as to be least injurious to the third (*i.e.* the non-privileged) person." The Roman civil code directs the same.[7]

[7] Privilege (*privilegium*) is defined to be a private or particular law, whereby a private person or corporation is exempted from the rigor of the common law; or it is some benefit or advantage granted or allowed to any person, contrary to the course

VII. The more the text partakes of the character of a compact, the more necessary becomes close construction; for the compact must be acknowledged as the true and sole ground of agreement; and the nature of the text obliges us to presume that much care has been bestowed upon the selection of words; still, if a word, or sentence of a contract, leaves a decided doubt, sound sense dictates that they are to be taken most strongly against the party using it; because it was his affair to word the instrument well: *Verba ambigua fortius accipiuntur contra proferentem.* The civil law acknowledges the same principle: *In obscuris quod minimum est, sequimur; secundum promissorem interpretamur.* Dig. L. 50, Tit. 17, l. 9, L. 45, tit. 1. l. 99, pr.[8]

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of law, and is sometimes used for a place that hath a special immunity; a *privilege* is, therefore, *personal* or *real*. Jacob's L. Dic., art. "Privilege."

In common use, the word with us has almost lost its proper sense, and has come to be used as equivalent merely to benefits or advantages. It is so defined in Webster, and President Woolsey speaks of "*difference* of privileges in regard to the tenure of land in the marriage condition" (Political Science, vol. I., p. 276), where a civilian would simply say "privileges."

But in "mill-privileges," "water-privileges," and the like, the proper force of the word is still visible, the terms being applied to individual rights in running streams, or other things that by the common law would be public, or common property. So, when the right of suffrage is termed a privilege, the sense is, not that it is a peculiar benefit or advantage to the voter, but that it is not a matter of common right to all persons, but one granted or intrusted by the Constitution to a particular class of citizens.

The "distinction between a statute which establishes a general rule of law and one which merely confers a right upon individuals" is stated by Mr. Holland (Essays on the Form of the Law, p. 174) as consisting only in the fact that the citizen is subject to one wherever he goes, and to the other only in a particular place, or under particular conditions. This certainly admits that both alike have the character of law. Yet, even so stated, Mr. H. regards it as of great importance, and calls it a "scandal" that an apparently special act occasionally contains a fragment of general law. (*Id.* p. 174; see, also, pp. 130, 149). He refers to Barnet *v.* Cox, 9 Q. B. 617, as a proof that the decisions of the superior courts have not always been free from confusion upon the subject.

Privileges and *beneficia legis* are to be interpreted by the general rules. In their case, as well as others, grammatical interpretation is to be employed in case of doubt; and so privileges of a general import are, in cases of doubt, to be understood according to the usual meaning of the words, — that is, as general. Thibaut Pand., §49. Compare Savigny's System, vol. I., § 36, notes *h* and *i*, and § 37; L. 3, D., I. 4; L. 192, § 2, D. de R. J. 50, 17. — Ed.

[8] The second passage quoted in the text is part of a fragment of Celsus, the whole of which deserves notice in this connection.

Quidquid astringendæ obligationis est, id nisi palam verbis exprimetur omissum

VIII. Whenever the text expresses the promise or obligation of performing some act, the demand contained in the text is to be taken as the minimum, if it involves a sacrifice of the performer and a benefit of the person towards whom the act is to be performed; but as the maximum, if the performance of the act is to the advantage of the performer, and the disadvantage of the other party.[9]

Good faith and common sense are sufficient to show the justice of this rule to be highly important, as the disregard of it is contrary to these first elements of all interpretation and defeats the objects of any text of the above character.

A leaves a large fortune to B, on condition to pay annually the sum of £500 to a hospital; in case of failure, C shall come in as heir and have half of the property. B is of a peculiarly benevolent disposition, and pays £1,000 instead

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intelligendum est; ac fere secundum promissorem interpretamur: *quia stipulatori liberum fuit verba late concipere.*

To the same effect is a passage of Venulcius, L. 38, § 18, Dig. de V. O. (45, 1). In stipulationibus cum quæretur quid actum sit, verba contra stipulatorem interpretanda sunt.

It will be noticed that in the Roman *stipulatio*, it was the *stipulator*, or, as we should say, the *promisee*, who formulated the words of the obligation. In our modern forms the same principle would lead to an interpretation favorable to the obligee or promisee.

That all the words of the deed in construction be taken most strongly against him that doth speak them, and most in advantage of the other party. Verba cartarum fortius accipiuntur, contra proferentem, et quælibet concessio fortissime contra donatorem interpretanda est. Co. Lit. 183; Finch, 6; Co. Lit. 36, 182; Plow. 160. And yet this is to be understood with this limitation: that no wrong be thereby done; for it is a maxim, in this: Quod legis constructio non facit injuriam. Co. Lit. 183; Finch, 6; Shephard's Law of Common Assurances, p. 265.

The canon law gives the same rule in a still more general form.

Odia restringi, favores convenit ampliari. C. 15, de R. J., in 6to.

Plus semper in se continet quod est minus. C. 35, de R. J., in 6to.

[9] In all cases where this rule is applied, it is assumed that the relation of greater and less is clearly determined, and not likely to change. Where quantities of space or number only are concerned, the rule is not likely to lead to difficulty; but where the distinction is of value, merit, preference, etc., a change in the relations of the two terms almost certainly destroys the rule. See the case of spring and winter wheat, *ante*, note 20 to chap. IV. The penalty of a bond is usually placed so high that it will always be to the interest of the obligor to perform, rather than incur it. But, suppose the case otherwise. Has he the option to submit to the penalty? It seems that he has not. See early authorities collected in 8 Viner's Abridgment, 68; also Hooker *v.* Pynchon, 8 Gray, 550; Darley *v.* Litchfield, 10 Mich. 29.

of £500 to the hospital. C brings in an action, claiming half of the fortune, on the ground that B has not strictly complied with the terms of A's will. The judge would be obliged to decide that there is no ground for the action, because, in this case, the minor, £500, is contained in the major, £1,000. B has performed his obligation, and done something over and above it. The sum of £500, mentioned in the will, is the minimum, because its payment is a sacrifice to B, and a benefit to the hospital.

The case, related above, when Spinola was, according to the articles of surrender, to garrison one thousand men in Wesel, and, on complaint that he had sent in more, pleaded that he complied with the articles, because he had sent one thousand men, and that the said articles did not stipulate that he should not garrison more than one thousand in Wesel, is likewise in point.

It was faithless and against common sense in Spinola to interpret thus; the capitulation expressed the maximum, because the performance of the act was beneficial to him, and exacted a sacrifice on the part of the citizens. Indeed, the number of the soldiers to be quartered in Wesel, of itself, was of no importance; it was the support they required, and their military importance with regard to the prosecution of the war, which made the capitulation desirable. The citizens of Wesel would have had no right to complain had Spinola quartered with them eight hundred men only; but the case would have changed had the one thousand men been demanded on their part on account of security, for instance, or that they might have an excuse for surrendering, by showing his strength.

If, however, the service to be performed, and stipulated

for, is of a kind that, if the measure agreed upon be exceeded, it becomes an injury, good faith and common sense oblige us to consider the stipulation a maximum. To many readers, all these remarks may appear superfluous; yet violations of these elementary rules have taken place so often, in order to rob people of their property, that it is right we should clearly present them to our minds. Respecting the last rule, I instance a case in which A was obliged to let B have sufficient water, from a dyke, to drive B's mill. It was stipulated that a certain flood gate should not be closed. In consequence of a dispute, A opened two instead of one, and destroyed much of B's property, maintaining that he had complied with the contract.

IX. As we are bound to prefer that which is fair to that which is unfair, if the mere words of the text may mean one or the other, so we are bound to prefer in construction that which agrees most with the substance of the text.

1 Blackstone, 60, French Civil Code, 1158;[10] Pufendorf, Law of Nature and Nations, Book V. 12. Grotius as quoted above.

X. The effect and consequences may frequently guide us in construction, but with the same caution which we recommend with regard to deriving assistance from the motives of the utterer; for people imagine very different effects to ensue from the same causes, and again, they have

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[10] Code Civil, § 1158. Les termes susceptibles de deux sens doivent être pris dans le sens qui convient le plus à la matière du contrat.

Terms capable of a double sense should be understood in that which agrees best with the subject of the contract. — Ed.

very different opinions respecting the beneficial tendency of the same effect.

See 1 Blackstone, 59; 1 Kent's Commentaries, Lect. xx. 460, and sequel.

Though I shall touch upon the subject of the construction of laws separately, I will give here Blackstone's words respecting it; because they are applicable in a wider circle than merely to laws. He says, I. 59, — "The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at a time when the law was made, by *signs*, the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law."

I have never been able to understand how the subject-matter, effects, &c., can be called signs. Pufendorf has been justly followed by Blackstone on this subject, and the words of the former are: "Signa illa sunt duum generum, verba, et aliæ conjecturæ; quæ considerantur aut seorsim aut conjunctim." De Jure N. et G. v. cap. xii. 2. But the word *sign* must be taken here in the peculiar sense which Pufendorf defines in the work itself.[11]

XI. The farther removed the time of the origin of any text may be from us, the more we are at times authorized or bound, as the case may be, to resort to extensive con-

[11] Puffendorf says, in the passage quoted: "These signs consist either in words or in conjectures; and these are to be considered either separately or conjointly." To which his commentator, Barbeyrac, adds: "That is to say, so that the conjectures are drawn either from the words alone, or from some thing else not contained in them." Le Droit de la Nature et des Gens, traduit par Barbeyrac, Amsterdam, 1734. Tom II., p. 140. It is evident that the distinction thus made corresponds to our author's between interpretation and construction, rather than to any subdivision of either title. See additional Note B, on the Division of Interpretation, and note 2, p. 111 *ante*. — Ed.

struction. For times and the relations of things change, and if the laws, &c., do not change accordingly, to effect which is rarely in the power of the construer, they must be applied according to the altered circumstances, if they shall continue to mean sense or to remain beneficial. The benefit of the community is the supreme law, and however frequently this maxim may have been abused, and is daily abused, it is nevertheless true. Whether we rejoice in it or not, the world moves on, and no man can run against the movement of his time. Laws must be understood to mean something for the advantage of society; and if obsolete laws are not abolished by the proper authority, practical life itself, that is, the people, will and must abolish them,[12] or alter them in their application. Lord

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[12] The question whether written law can be repealed, in whole or in part, by custom, has given rise to much difference of opinion among Roman jurists. The texts relating to this subject are the following: —

Ea (jura) vero quæ ipsa sibi quæque civitas constituit, sæpe mutari solent vel tacito consensu populi, vel alia postea lege nata. Inst. I., tit. 2, de jure natur., § 11.

Sed et ea quæ longa consuetudine comprobata sunt, ac per annos plurimos observata, velut tacita civium conventio non minus quam ea, quæ scripta sunt jura, servantur. L. 35, Dig. I., tit. 3.

Quare rectissime etiam illud receptum est ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium par desuetudinem abrogentur. L. 32, Dig. I., tit. 3, § 1.

Consuetudinis ususque longævi non vilis auctoritas est, sed non usque adeo sui valitura momento ut rationem vincat ant legem. L. 2, Cod. VIII., tit. 53.

The difficulty arises from the last passage, and especially as to the true meaning of the words *rationem* and *legem*. The better opinion, and that held by Puchta and Savigny (1 Puchta, Inst. 48; 1 Puchta, Vorles., 30, 42; 1 Sav. System, 151; Beil. 2, p. 400), seems to be that general law can repeal a general or particular custom; that general custom can repeal a general or particular law; that a particular law can repeal a particular, but not a general, custom; and that a particular custom can repeal a particular, but not a general, law. Savigny, commenting on the above passage in the code, is of the opinion that it applies only to particular, and not to general, customs; that the word *lex* means a general law; and that the word *ratio* means, not a *ratio juris*, nor abstract reason, but the *ratio publicæ utilitatis*. The import of the passage he takes to be this: Particular customs are invalid if opposed to the general interest of the state, whether such general interest be declared in a general law or not. Lindley's Introduction to Jurisprudence, Appendix, p. 188.

It has been repeatedly held by English writers and judges that a law cannot be repealed by time, and that no custom can take away the force of an act of Parliament. Co. Lit. 113 a, 115 a; 1 Bla. Comm. 186; 2 Dwar. on Stat. 529; White *v.* Root,

Bacon says: "Let penal laws, if they have been sleepers of long, or if they be grown unfit for the present time, be

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2 Term Rep. 274, *per cur.* An act of Parliament cannot be repealed by non-user. Notwithstanding any practice that may have obtained to the contrary, as long as the statute remains unrepealed, we must see it carried into execution.

But custom is of great force in the construction of statutes; and, on the same principle, it seems difficult to deny that long and uniform disuse might amount, in some cases, to a practical repeal. Sedgw. on Stat. and Const. Law (Pomeroy's ed.), 96; Leigh *v.* Kent, 3 Term Rep. 369, *per* Lord Kenyon. Though, where the words of an act of Parliament are plain, it cannot be repealed by non-user, yet, where there has been a series of practice without exception, it goes a great way to explain them where there is any ambiguity.

A practical admission that statutes do become obsolete by time, of the strongest kind, has been made by the various acts of Parliament passed of late years to repeal such obsolete statutes, for the purpose of getting rid of them from the printed editions. The first of the series was the so-called Expurgation Act of 1856 (19 & 20 Vict., c. 64). That of 24 & 25 Vict., c. 101, repealed statutes passed between 11 Geo. III. (1771) and 16 & 17 Vict. (1853), thus showing that a very brief period is required in some cases to make a statute obsolete. The series was completed by 26 & 27 Vict., c. 125, repealing obsolete statutes between Magna Charta and the reign of James II., and 30 & 31 Vict., c. 59, between 1 Wm. & M. and 10 Geo. III. Full accounts of these acts may be found in the following passages of Hansard's Parliamentary Debates: Vol. cxli., p. 1084; vol. cliv., pp. 483, 1370; vol. clvi., p. 1238; vol. clxi., p. 1057; vol. clxxi., p. 776; vol. clxxxvii., p. 1198.

Dwarris has said, indeed (p. 529), that this very process of repeal is proof that the statutes had not lost their force by mere non-user, and instances the statute 14 Geo. III., c. 58, which was held necessary to repeal laws as old as the fifteenth century, in regard to the qualifications of members of Parliament. But the recent acts go upon a different theory.

In Scotland, where the authority of the civil law is recognized, it is held that, as one statute may be explained or repealed by another, so a statute may be explained by the uniform practice of the community (L. 37, D. de legibus, I., 3), and even go into disuse by a posterior contrary custom. But this power of custom to derogate from prior statutes is confined by most [Scotch] lawyers to statutes concerning private right, and does not extend to those which regard public policy. (Smollet, Feb. 1729;) Erskine's Principles of the Law of Scotland, book I., tit. 1, § 16. See Dwarris, p. 529, copied by Sedgwick, p. 95.

To the last remark it should be added that in England the reverse seems to be the case, at least practically. The statutes which have been disregarded as obsolete, and at last repealed for the same reason, were mostly those which regard public policy.

The following extract from statute 12 Rich. II., c. 2 (A. D. 1388), is among the acts *not* regarded as obsolete: —

"Nor that none which pursueth, by him or by other, privily or openly, to be in any manner office, shall be put in the same office, or in any other; but that they make all such officers and ministers [*i.e.*, all public officers in the kingdom] of the best and most lawful men, and sufficient to their estimation and knowledge." The Statutes Revised (ed. 1870), vol. I., p. 236.

When we reflect that this statute, from its date, is part of the common law of the United States, it is clear that, if it were not practically obsolete, all the recent efforts at civil-service reform would be superogatory, not to speak of the doubt that might be thrown on the lawful tenure of a great many elective and other officers! — Ed.

by wise judges confined in the execution;" * and even a Mansfield was obliged to charge the jury to find the value of stolen articles under forty shillings, when the real and evident value was far higher.†

Great evil has arisen at various epochs from insisting on established laws in times of great crisis; as if the human mind could be permanently fettered by laws of by-gone generations. It was the misfortune of the Catholic party, at the time of the Reformation, that they did not understand the regenerating spirit of Europe, and thought they could conjure it by the formulas of ancient laws. Neither the papal excommunication, nor the canon law, was able to banish or encircle this spirit. Previous to almost every revolution, there exists a party whose characteristic trait is this mistake.

A single glance at the book on the State in the Political Ethics[13] will suffice, I trust, to protect me against any imputation that I do not sufficiently value the supremacy of the law. I consider the principle all important.

XII. Yet it is necessary to remember well that, in general, nothing is so favorable to that great essential of all civil liberty, the protection of individual rights, as

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* Bacon's Essays, Civ. and Moral, on Judicature.

† The often, perhaps too often, quoted case, where the Chief Justice of England punned in favor of a capitally indicted prisoner, is in Holiday, page 213. Lord Mansfield recommended to the jury to find the value of a gold trinket, which the prisoner at the bar had stolen, under forty shillings; for on this depended his life. The prosecutor exclaimed: "Why, my lord, the fashion alone costs me more than double the sum!"

Mansfield: "That may be, friend, yet God forbid that we should hang a man for fashion's sake!"

[13] See especially chap. VI., pp. 210–263, and chap. XI., pp. 334–350, of Political Ethics (3d ed.), by Dr. Woolsey. Phila. 1875. — Ed.

close interpretation and construction. Most laws lose in their protective power, in the common intercourse of men, (which is the most important, because of daily and hourly occurrence,) according as they are loosely interpreted. Several surprising decisions of the English courts exist, which were, indeed, the consequence of an apparently literal interpretation. Verdicts, even, are not wanting which evidently defeated the object of the law, in consequence of adhering to its mere letter; yet I do not hesitate to avow my firm belief that England owes her civil liberty and that civic spirit, so common in the whole country, compared to many others, to no circumstance in a higher degree than to the habitually close construction of her laws. On the other hand, the laws of the European continent were, for a long time, loosely interpreted, and construed according to the effects and presumed motives of the legislator, &c., whenever there was a question of right between the individual and those who possessed the power, or the same law was differently interpreted or different occasions.

The result of our considerations then will be, that we ought to adhere to close construction, as long as we can; but we must not forget that the "letter killeth," and an enlarged construction becomes necessary when the relations of things enlarge or change. We ought to be careful, however, not to misjudge our own times; for every one who is desirous of justifying an extravagant construction does it on the ground, that the case is of a peculiar character and the present time a crisis.[14] Every demagogue,

[14] Although this was written more than forty years ago, it might almost be thought that the author's remarkable genius for politics — in the higher and better sense of

tyrant, or selfish man, in public or private life, resorts to this argument, to palliate unwarranted acts before others, or his own conscience. However delicate this subject may be, the truth of what has been said is nevertheless apparent; and, to be safe in this particular, we must return to one of the first principles, that, without good faith and conscientiousness, there is no true interpretation or construction possible.

XIII. Words of a relative or of a generic meaning must be taken in a relative or expansive sense, if the character and object of the text oblige us to do so, but not if they have been used to express something definite or absolute.

If the term "genteel education" is used with reference to the character of a school to be supported with certain foundations, it will be found necessary to take the expression in that meaning which each successive period attaches to it. If the direction, however, is to instruct in certain branches which have been enumerated, and it were then added, and "all branches called a genteel education," there might be reason to limit the meaning to that of the time.

The lawmakers cannot have had Mr. Perkins's steam-gun in view specifically, when they passed the law relating to murderous arms, previous to the invention of the steam-

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the word — had enabled him to foresee the most threatening dangers of the present day. At every election, we are asked by one party or the other to do something that is not wise, or just, or prudent, under usual circumstances, on the ground that this particular election involves a crisis in the history of the country which must be met by extraordinary means. And if the wise example of Washington be disregarded, and the country deprived of the safeguard which that example gave it in the limitation of the presidency to two terms by the dignified retirement of the chief magistrate at his own option, it will undoubtedly be due to the belief which has been so earnestly instilled into men's minds, that a crisis is at hand, not to be met by ordir ary methods or men. — Ed.

gun; yet the word "arms" necessarily includes this species, because the steam-gun agrees in all essentials with the other arms specifically mentioned in that law.

"A suit of clothes" means (in the United States) something very different from what it did formerly, or does at present, in other countries. A judge, in the state of Kentucky, decided that a suit of clothes to be given, according to stipulation, to an apprentice after having served his time, ought to be worth forty dollars. The case given in the foot-note on account of its length, appears of great interest with reference to the topic under discussion.*

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* One of the most striking cases in point is that of the fellows of English universities. Before a graduate can become a fellow he must take an oath that he has not otherwise an income above a certain amount, expressed in pounds sterling. Yet there are many who have more and nevertheless take the oath. Bishop Fleetwood wrote a whole volume to prove that the oath might be taken, because this condition was prescribed by Henry VI., when, as he shows from the prices of the necessaries of life, that prescribed small amount was worth perhaps twenty times what it is now, when in short a pound sterling had a totally different meaning. I shall give the whole title of the book, because it shows the contents: Chronicon Preciosum, or an Account of English Gold and Silver Money; the Price of Corn and other Commodities, and of Stipends, Salaries, Wages, Jointures, Portions, Daylabour &c in England for Six Hundred years last past: Showing from the Decrease of the value of Money, and from the Increase of the Value of Corn and other Commodities &c, That A Fellow, who has an Estate in Land of Inheritance, or a perpetual Pension of Five Pounds per Annum may conscientiously keep his Fellowship, and ought not to be compelled to leave the same, tho' the Statutes of his College (founded between the years 1440 and 1460) did then vacate his Fellowship on such Condition. By Bishop Fleetwood. To which is added An Historical Account of Coins, illustrated with several Plates of Gold and Silver Coins. London 1745. (A Copy in S. C. C. Library.)

The rationale of the whole work is contained in the first chapter and

It has been considered that the charter of Harvard University, when making use of the term "Christian doctrine," applies as well to Unitarians as Trinitarians; though no Unitarians were existing in New England, when the charter was granted.

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the conclusion. In the former, page 7, the author says: "I do affirm then, with the best judgment I have, that I am seriously persuaded, that, altho' you are actually possessed of an estate of VI pounds per An. as Money and Things go *now*, you may safely take that Oath, upon Presumption that VI l. *now*, is not worth what V l. was *then*, when that Statute was first made. Because whosoever swears, swears to *Things* that are signified by Words and not to *mere Words:* when a word signifies the same Thing *now*, in effect, which it signified 260 years ago, then he who swears to *words*, swears to things they signify; but when different Things are signified by the same Word, then he who knows *that* Difference of Things, cannot help giving such Word its proper and intended Signification."

And in the Conclusion, page 136: "So that 30 Pound *now*, would be no more than equivalent to V l. in the Reign of H. VI."

And on page 137: "Sir H. Spelman (a very competent Judge and Estimator of these matters) complains, That the Laws have not sufficient Regard to different Price of Things, when they condemn People to death for stealing Things to the Value of *twelve Pence;* for tho' that is according to Law, yet that Law was made when *twelve Pence* would have purchased as much as you must now-a-days give 20, 30, nay 40 s. for. And he instances in *Quarter of Wheat*, which in the *Assise of Bread*, 51 H. III. was rated at *twelve Pence*, but, in his Time, was often sold for 40 s. and upwards. 'Tis certain, the Laws do never condemn any One to death, for stealing to the Value of *one*, no, nor *three* or *four* shillings: But 'tis certain that many die for stealing Things of less Value than 20 shillings. And therefore, I think, I have very sufficient Reason (not to *determine* but) to *conjecture*, that 5 l. 260 years ago, was equivalent to 28 or 30 l. now. And consequently, that he who has *an Estate of Inheritance*, or a *Perpetual Pension*, of that Value now-a-days, may as honestly hold a Fellowship with it, as he, who lived 260 years ago, might have held it, with 99 s. *per Ann.*"

The italicizing in this note is in the original work of the book of Fleetwood.

It is necessary to pay attention to three points in questions of this character: —

First. Did the utterer use the doubtful word in a definite, absolute, or circumscribed meaning; or did he make use of the word as a relative, generic, or expansive term.

Secondly, if the latter be the case, what did the utterer consider as an absolute and definite characteristic, or as a generic sign: what may be considered in that which is designated by a certain word, as fixed and unalterable, and what as variable, expansible, or contractible, according to the change of circumstances and relations between things and men.

Thirdly, is the subject to which the text relates of that elementary, vital, and absorbing importance to society, that every other interest, or consideration, must yield; so that in construing the difficult parts of the text, we are obliged to regulate our decision rather by the meaning which the words would now have, taken in connection with things and circumstances as they now exist, than by the known meaning which the utterer attached to them, in connection with the then existing relations. Here the difference between interpretation and construction is evident.

The many foundations which were made, before the time of the Reformation, for the support of clergymen, or for the diffusion of Christianity by other means, were construed, by the protestants, to mean, that the pious founders were anxious to diffuse true religion, and that at the time of the Reformation they would have meant biblical or evangelical Christianity, or whatever else it may be called. Interpretation cannot but acknowledge that the founders had distinctly and positively the Roman apostolic catholic religion

in view. They neither thought of protestantism, nor would they have viewed its doctrines, at their time, with any thing else than aversion. Yet religion is too important to allow any generation to forestall every future change.

The conversion into school funds, of funds left for the reading of masses for the dead, was not in consequence of any construction, transcendant or otherwise. This was an absolute change, which could only take place in consequence of high legislative action. When, on the other hand, individuals who united in their capacity the character of priest and sovereign, and who had been elected on the very ground that they were catholic priests, and, consequently, not married, embraced protestantism without resigning, but, on the contrary, declared themselves hereditary princes, after having married, it was revolution, and can be judged of only on that ground.*

XIV. Whenever a decision between the powerful and the weak depends upon our construction, the benefit of the doubt is given to the weak. Of course our construction must not defeat the general object of the text.

This principle has always been acknowledged, though it has not always prevailed. When the elector of Saxony demanded that Luther should be called to the diet, assembled at Worms, and be heard, the elector urged that it is

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* Prince Albert of Prussia, the master of the Teutonic order, thus made himself Duke of Prussia by revolution alone; and it was revolution, which Luther advised some prelates to resort to, when he called upon them to profess protestantism and declare themselves independent sovereigns. No construction whatever could arrive at this decision; but revolutions become at times indispensable; this, however, is not the place to discuss the subject.

customary according to German liberty, to prefer, in doubtful cases, the lenient one.*

XV. The general and superior object cannot be defeated by a less general and inferior direction; and, in general, the higher prevails over the lower, the principle over a specific direction.[15]

Pufendorf gives, in illustrating another rule, however, the instance, that there exist a law that no citizen shall carry arms on festivals; another to assemble with arms, as soon as the alarm bell is sounded. A hostile fleet appears on Sunday off the harbor, the bells are rung, what has the citizen to do? He has to go armed of course, because the first mentioned law was given to maintain peace and safety; the second, to save the city. The repelling of the enemy, and the freedom of the city, is the most important. It does not appear to me, that the citizen ought to go armed on Sunday, "because the second law forms an exception to the first," in this case if it does, it is only because the exception is founded upon a more general principle; if it were not, it could not possibly have the power of overcoming the other law, which prohibits going armed on festival days.

If the exceptions are specified, or if we can give to a text the character of an exception to the general, the exception of course prevails as we have stated.

XVI. In order to give the proper meaning to each word

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* Palavicinus, I. 26, 5.

[15] But this must not be confounded with the very different rule governing the relations of general and special *laws*, in which the order is exactly reversed, and the more specific prevails over the more general. — Ed.

or sentence, we ought to consider the whole text or discourse together; without this, we can never arrive at a fair interpretation or construction.

XVII. Recapitulating the general principles of construction, we shall find the following to be most essential:

1. All principles of interpretation, if at all applicable to construction, are valid for the latter.

2. The main guide of construction is analogy, or rather, reasoning by parallelism.

3. The aim and object of an instrument, law, &c., are essential, if distinctly known, in construing them.

4. So also may be the causes of a law.

5. No text imposing obligations is understood to demand impossible things.

6. Privileges, or favors, are to be construed so as to be least injurious to the non-privileged or unfavored.

7. The more the text partakes of the nature of a compact, or solemn agreement, the closer ought to be its construction.

8. A text imposing a performance, expresses the minimum, if the performance is a sacrifice to the performer; the maximum, if it involves a sacrifice or sufferance on the side of the other party.

9. The construction ought to harmonize with the substance and general spirit of the text.

10. The effects, which would result from one or the other construction, may guide us in deciding which construction we ought to adopt.

11. The older a law, or any text containing regulations of our actions, though given long ago, the more extensive the construction must be in certain cases.

12. Yet nothing contributes more to the substantial protection of individual liberty, than a habitually close interpretation and construction.

13. It is important to ascertain, whether words were used in a definite, absolute, and circumscribed meaning, or in a generic, relative, or expansive character.

14. Let the weak have the benefit of a doubt, without defeating the general object of the law. Let mercy prevail if there be a real doubt.

15. A consideration of the entire text or discourse is necessary, in order to construe fairly and faithfully.

16. Above all, be faithful in all construction. Construction is the building up with given elements, not the forcing of extraneous matter into a text.[16]

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[16] See Additional Note I, on the value of Formal Rules of Interpretation. — Ed.

CHAPTER VI.

Hermeneutic Rules respecting detached spoken Words or Sentences — Conversation — Hearsay — In judicial Procedures — Letters, Journals, Private Notes — Speeches — Pamphlets — Orders, Directions, &c., of a passing Nature — Contracts, Deeds, Wills, &c. — Laws must at Times be interpreted or construed — Hermeneutic Rules respecting Laws — Constitutions — Constitutions are Laws and Guarantees — Various Constitutions — Rules of Constitutional Hermeneutics — The Veto and Pardoning Privilege — International Treaties.

I. If we apply these general rules of interpretation and construction to the various subjects which, in politics and law, may form the text, some particular rules, peculiar to these respective subjects or of especial importance respecting one or the other, will be found.

II. *Detached spoken words or sentences*, not pronounced on solemn occasions, or in public. Merely spoken words may be of the greatest importance; for instance, in criminal cases. Every thing may depend upon a proper understanding of some words uttered by a person; or they may possess very high political importance; for instance, the answer which Queen Elizabeth gave, when asked whom she designated as the fittest person to succeed her.[1]

The more the discourse, in which the words in question

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[1] The explicit declaration, on her death-bed, ascribed to her by Hume and most other writers, that her kinsman, the King of Scots, should succeed her, is not confirmed by Carey, who was there at the time. "She was speechless when the council proposed the King of Scots to succeed her, but put her hand to her head as if in token of approbation." Earl of Monmouth's Memoirs, p. 176. But her uniform conduct shows her intentions. Hallam's Constitutional History of England, Vol. I., p. 392. — Ed.

were uttered, assumes the character of conversation, the less importance we can attach to them; for, to understand them entirely, we ought to know the accent, the gesture, the expression of the face, which accompanied them, or the whole spirit of the conversation, which gave rise to them. This spirit of the conversation, or the expression of the features during the utterance, may even indicate, by way of jest or irony, that the very contrary was meant from what the words would directly intimate. The accent in speaking and that which prevails as the general idea in the minds of utterer and hearer, are, in all conversations or spoken words, not only sufficient substitutes for exactly grammatical use of pronouns and relatives, but in many cases, better and clearer. Written words allow of calm perusal and considerate application of each pronoun to its proper noun. Wherever tyranny sends out her listening informers it will be found that many people are sentenced, because not sufficient or no regard is paid to these concomitants of all conversational intercourse.[2]

All these accompaniments of oral intercourse are, however, evanescent; the words alone are reported, and these undergo considerable changes with each new transmission. The frailty of tradition shows itself nowhere more strongly than in hear-say, and reports are never more to be dreaded than when, from the nature of the subject they are transmitted in secret. Woe to the man who lends his ear to

[2] However hateful the reports of spies may be, however cruel the sentences of tyranny, it may well be doubted whether these have occasioned so much unhappiness to the human race as the careless or spiteful repetition and misconstruction of words in private life. All that the author has said of the difficulty of understanding a repeated conversation aright applies with peculiar force in this domain of private gossip, and has a lesson which to the majority of us is far more necessary than protection against tyrannical misconstruction. — Ed.

whispers! Woe to him who is influenced by what is commonly called talk, be this that which is ultimately transmitted orally, or in newspapers or memoirs. We may lay it down then, as a rule, to discard such reports altogether, unless they have reference to facts, which facts we have it in our power to ascertain otherwise. It is a very simple rule, yet daily forgotten, in common intercourse, in newspaper debates, in politics, be they of a popular sort or relating to courts, in judicial trials, and in the study of history. If you peruse a file of papers issued during the wars between England and France under Napoleon, you will find striking and incredible proofs of the remark just made.[3] If the above-mentioned rule were strictly adhered to, it would give a death-blow, at once, to all systems of espionage.

In judging by hear-say, people are always too apt to break two necessary and obvious rules; the one furnished by criticism, the other by common morality. The first has been mentioned already, namely, inquire first of all, whether the text be genuine. Were the words really uttered? Were they uttered precisely? Were they not uttered under circumstances which made them convey an entirely different meaning from what they seem to express in their detached form, as reported? The second, furnished by common morality, is, that we should not studiously endeavor to make the worst of the words or actions of our neighbors. Plain justice demands that we should take them in the spirit in which they were meant, and that we should endeavor to find out that spirit; plain charity

3 The reader of the present day need hardly go across the ocean, or so far back, for illustrations which he will find in great abundance in our own Nation.—Ed.

demands that we should give full weight to a possible good interpretation, which charity becomes but justice, considering that all of us stand in equal need of it. Now, read the papers, especially if any question of vital interest is pending, be it in politics or religion, or any other sphere, and it will be seen whether it is not worth while to mention two rules, which, in themselves seem so plain, that no one might be supposed to dissent from them.

In judicial procedures, it will probably be found a safe rule to disregard and discard, at once, any report of words, which imply the injury of a person, and, which at the same time, are vague.[4] If, however, the adoption of the words injures one party, and the discarding, another, it is necessary, of course, to proceed in good faith upon all the sound rules of interpretation and construction. This is frequently of great importance respecting the last declarations of persons on their death-bed. In these cases, good faith obliges us, not to found any argument upon the nice position of words, or the peculiar reference which certain pronouns may have; because, as has been alluded to already, even in common converse, we refer pronouns much more to the logical subject of the sentence, than to the grammatical, because the former is uppermost in our mind. Every one who has ever written for the press

[4] This seems hardly consistent with the author's own theory of interpretation. It follows the common one, which confines its use to cases of particular difficulty. Yet, even thus, the rule he gives is too exclusive. Many of the most atrocious libels and slanders (as in the familiar case where a crime was charged by saying, sarcastically, that the party did *not* commit it) are couched in vague terms, which require interpretation, and that the interpretation of mere spoken words, to the injury of a party; and yet the report of them could not be discarded without the grossest failure of justice. But, as a rule of private conduct upon such reports, the author's remark and the entire passage are not only just, but animated by a noble and lofty spirit. — ED.

will have found that he has had to change, after a careful perusal of what he wrote with vivid interest, these pronouns, which in the original draft related to the general subject, rather than to the subject of the specific sentence. The same happens with the singular and plural number of nouns and verbs.[5]

There is a remarkable instance, illustrating this subject, on record, in the trial of Earl Strafford for high treason. I mean the deposition of Sir Henry Vane respecting the notes which his father had taken of a debate at the council-table of Charles I. In these, Strafford was made to say, among other things: "And you (the king) have an army in Ireland, that you may employ to reduce this kingdom to obedience; for I am confident the Scots cannot hold out five months;" upon which the question arose, whether Strafford used *this*, *that*, or *their*, and whether this meant England or Scotland.*

III. *Letters, Journals, Private Notes, &c.*

This is not the place to discuss the outrage of the unauthorized publishing of private letters, or the crime of unauthorized opening them. A letter thief, as Luther calls every one, officer or not, who breaks the seal of a letter not addressed to him, is as bad, and, at times, worse, than a

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* See State Trials, vol. III. p. 1442. Brodie's History of the British Empire, Edinb. 1822, vol. III. p. 91. Also Lingard, vol. X. chap. II. Lingard, however, is not important as to this portion of British history.

[5] A striking illustration of this remark will be found in our author's own text, a few pages further on, chap. 6, § 4, p. 4: "Yet the same word does not always mean the same in the same discourse or text. This would, in fact, militate with the important rule that we are to take words in their natural sense," etc. The pronoun "This," has no expressed antecedent. It refers to a supposed rule denied in the preceding sentence.—ED.

common thief, according to the same authority; and Lord Falkland, even in those troubled times in which he lived, declared the opener of letters to be the worst of spies. Clarendon, VI. 235.

The unauthorized opening of private letters, or perusing notes for private use only, is a most immoral act, well known and felt by every "letter thief;" for, who will boldly and without blushing, acknowledge it? It is breaking into one of the most sacred sanctuaries of humanity. Nearly the same rule applies to the unauthorized publication of private letters, even though they may have been directed to us. Letters do not become absolutely ours, that is, we are not absolutely free to dispose of their contents, although the letters be directed to us. The American law acknowledges this; it has been decided, that the law, that no person has the right of publishing any thing of another's without a written order or permission of the writer, is applicable to letters; the property of them remains in the letter-writer.

Niebuhr, the historian, expressed himself unqualifiedly against the publication of private letters, the authors of which are defunct, because he considered it unjust toward those who could no longer explain, besides that it is, according to him, unfair in a high degree to invade the privacy of any man.* Cicero expresses himself very

* The publication of Humboldt's letters to Varnhagen, even with the apparent consent or desire of their writer, furnishes one of the most striking illustrations, how unfair is the indiscriminate publication of private correspondence, and especially of that which approaches to neighborly converse. Every reflecting reader of these letters has probably asked himself: How, if all our private and friendly conversations were published and stabilitated, as it were?

strongly against divulging private letters. "At etiam literas," he exclaims against Anthony, "quas me sibi misisse diceret, recitavit, homo et humanitatis expers et vitæ communis ignarus. Quis enim unquam, qui paululum modo bonorum consuetadinem nôsset, literas ad se ab amico missas, offensione aliquâ interpositâ, in medium protulit, palamque recitavit? Quid est aliud tollere e vita vitæ absentium?" — "Quam multa joca solent esse in epistolis, quæ prolata si sint inepta videantur? quam multa seria, neque tamen ullo modo divulganda!" Cic. Phil. II. 3.

As to the law on the publication of letters, it was settled to be unlawful, by Lord Hardwicke, on June 5, 1741, in the case of Pope *v.* Curll, which was cited by Lord Mansfield in the famous case of Millar *v.* Taylor, respecting unauthorized printing of Thomson's Seasons.* [6]

Still, letters are not unfrequently published, sometimes with, sometimes without the consent of the author, and it becomes, not unfrequently, necessary for the citizen to form his opinion upon them. In historical and political

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* 4 Burr. 2303. Holiday page 216. See all the authorities and legal argument at the end of Earl Dudley's Letters, by Bp. of Llandaff. Lond. 1841.

[6] Upon the right to publish private letters, the cases will be found collected in 2 Kent's Comm. 380, and notes, especially note 1, by the last editor, Mr. Holmes. 2 Story's Eq. Jur., §§ 944-949. By the common law, a party had a property in his own manuscripts, and this is not lost by sending them to another in the form of letters. The author of letters of any kind has a property and an exclusive copyright therein, unless he unequivocally dedicate them to the public, or to some private person. No one has a right to publish such letters without his consent, unless such publication be required to establish a personal right or to vindicate character. Bartlett *v.* Crittenden, 5 McLean, 32; 4 McLean, 300. One who uses his manuscripts for the purpose of instructing others, does not thereby abandon them to the public; nor does he do so by permitting his pupils to take copies. *Ibid;* Woolsey *v.* Judd, 4 Duer, 379. — Ed.

memoirs, letters become equally often subjects of great importance.

The only safe and just rule, for the interpretation and construction of private letters, is, that we discard every thing which is not a bare statement of fact, or which does not carry along with it irresistible evidence of truth. Even the statement of facts ought to be given so as not to require any completion, on the side of the receiver of the letter, such as the letter-writer knew would be added during the perusal by the person addressed. As to every thing else, the language of a private letter is so entirely founded upon the relation between its writer and the receiver, their acquaintance with each other's character, use of words, nay, sometimes with the very accent with which the writer is in the habit of pronouncing certain sentiments or words, and upon a knowledge of so many details, which, though unmentioned, serve to give the right meaning to the words, that a letter, destined to remain private, frequently changes its whole character as soon as it is made public, and when a third person attempts to interpret whatever can be doubtful or ambiguous. The relation between two persons forms a key to their correspondence, for which nothing else can be substituted. There is a private *usus loquendi* between friends, husband and wife, members of a family, &c., which cannot be known by others.

Let it be repeated once more, for, unfortunately, it is but too important, that we ought to be fairly convinced of the genuineness of the letter in question. We cannot be too careful, in times of great excitement, to act upon this principle; for forged letters will often be given to the

public, and though the forger is sure that the forgery must be discovered, he perhaps calculates only upon the next effect, and does not care whether the forgery becomes known at a later period or not.[7]

The rules of epistolary hermeneutics apply still more forcibly to private journals. A journal consists of a series of memoranda addressed to one's self, and it is impossible for any other person to discover the precise meaning of any ambiguous expression. A private journal withdraws itself entirely from the common rules of criticism and interpretation: sometimes, from the very rules of logic, for a thousand diverse and indiscoverable motives may have prompted the writer to have expressed himself thus and not otherwise. The words themselves receive, not unfrequently, a meaning, different from the ordinary, yet one well understood by the writer who addressed them to himself, but not by others.

These remarks acquire still greater importance, whenever letters and journals are admitted as evidence in legal transactions. Private journals and memoranda, or any writing, if they have never been communicated to any one, are now justly excluded in most countries from the courts of justice. It was not always the case: the trial

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[7] A very curious and unusual forgery was published in the year 1875, in the columns of the Chicago *Tribune*, soon after the noted failure of the Cook County Bank. A firm of private bankers in New York, to which the president of that institution belonged, failed also; and its members got into litigation among themselves. That paper published an article of several columns, containing what purported to be extracts from a private journal of the president, betraying a great many secrets of his business career. It turned out that the extracts were mostly, if not entirely, authentic, in so far that they were written by him; but, instead of coming from a journal, they were extracts from the confidential letters which he had written to his partner. The case illustrates, with unusual force, the author's remark as to the "next effect" sought by a forgery, which must be exposed at a later period. See also Note 3, *ante* p. 74, as to the forged alteration of President Grant's Des Moines speech.—Ed.

of Algernon Sidney affords a well known instance. No one, who has not himself undergone trials founded upon letters, memoranda, and journals, and been called upon to explain doubtful or suspicious passages, can possibly form an idea of the difficulty, not only for any stranger to arrive at their true sense, but for the writer himself to place others in that precise point of view from which a particular piece of this class of writings can be rightly understood.[8]

The same may be said of any manuscript remarks which may have been kept in the possession of a person, without the intention of communicating them to others. Those who are not in the habit of noting down their thoughts suggested by occurrences of the day, do not know that such ideas may be written down with a positiveness in expression, which the writer is far from desiring to use in communicating them to others, or he may have set them down as if used by an opponent against himself, without giving his sanction to the whole, or even to any part of it. As to the legal point of view, that which has never left my desk has never left my breast; remarks, before being communicated to any one, are, though written, legally, but thoughts. Such, at least, is the honest principle which ought to be adopted every where. If they are notes of facts, they may of course serve to bring out the truth, like any thing else which may more or less serve to shed light on an important point.

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[8] A more striking illustration of the author's remark could hardly be invented by the most fertile imagination than that which will be found in the noted case of Tilton *v.* Beecher. The examination of the defendant in that case upon the meaning of his own written words deserves notice as an unequalled display of intellectual calisthenics. — Ed.

IV. *Speeches.* Speeches can be only correctly interpreted or construed, by paying attention to the following points.

1. To consider all the circumstances under which they were delivered; and, among these again, we ought to weigh well the general character of the meeting, the capacity of those to whom the speech was addressed, their number, and whether they were constituents, fellow representatives, or other citizens, each of which gives a very different character to a speech; and in what situation the speaker uttered it.

2. Whether it bears the character of having been prepared before-hand, or of being the sudden effusion of the moment; whether the utterer charges, or has been charged, provokes, or has been provoked.

3. To the fact that, in general, a speaker has to use more impressive and emphatic language than a writer, because he has to attract and rivet attention, while the reader does not take up a book unless he is disposed to direct his attention to the work, and because a reader can weigh at leisure the arguments and position of the author; the hearer of a speech cannot do this so conveniently; the word of mouth is fleeting.

4. Due deduction is to be made on account of the excitement of the moment.

5. We must seek, in the whole life and experience of the speaker, for a key to what he declares in the speech by way of principle or expediency. Men will sometimes make statements which, separated from their connexion, may have a very alarming appearance, and yet the whole life of him who uttered them may convince us that the meaning

of what he said cannot be such as it appears. We are bound, in such cases, to allow due weight to a man's life, and to construe his words accordingly; until facts prove that a change has actually taken place in the sentiments of the individual.

6. We must inquire whether the speech assumes more, or less, the character of special pleading.[9] Burke's and Sheridan's speeches during the trial of Hastings, would form very doubtful foundations for historical inquiries, without due regard being paid to this rule.

These rules are simple, and, indeed, recommend themselves chiefly because founded on good faith and common sense; yet they are daily disregarded, not only in the heat of party strife, but by the historian. How frequently are speeches quoted for or against a point, which would lose all weight, or, perhaps, have an effect opposite to the intended one, were these simple rules properly attended to. The same applies to historic anecdotes, often repeated for centuries and yet of no value, if duly criticised.

In regard to the application of the first principle of criticism to speeches, namely: convince yourself of the genuineness of the text, it is necessary to remark, that neither professional reporters, nor, always, our own ears are sufficient guarantees for the genuineness of the text. We

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[9] The ridicule of lawyers and legal forms in Cicero's oration, *Pro Murænâ*, and the exaggerated statement of a lawyer's duty to his client in Brougham's defence of Queen Caroline, are two marked illustrations of what the author here terms "special pleading." In the one case, the law was caricatured by an orator whose writings abound with proofs of his respect for it; in the other, a lawyer, never remarkable for self-abnegation, or sacrifice of his own claims to those of client, party, or cause, uttered a creed of devotion even immoral to a client; yet both are frequently quoted and reasoned from as if they were deliberate judgments upon the character of the profession.

It is hardly necessary to add that the sense in which the term "special pleading" is used here, is not the professional or the correct one. It is a colloquial phrase; the notion underlying which seems to be that of "pleading" (advocacy) for some "special" (selfish) object, without reference to the truth of the case. — Ed.

may misunderstand the utterer, especially in the noise of public assemblies, and an opportunity of fair explanation should not only be granted, but, if it depends upon us, should be afforded.

Remarkable instances of the interpretation or construction of speeches have taken place in legislative assemblies, when they have become the subject of parliamentary inquiry. Mr. Manuel was expelled from the French chamber of deputies, in February, 1823, in consequence of an unfavorable construction put upon an unfinished sentence of his. Our newspapers, political and religious, furnish but too frequent instances of similar judgments.

That pamphlets written in times of great excitement are to be interpreted and construed at the time, as well as by the later historian, with all the care which speeches require, would not be necessary to mention here, were they not so frequently used in a different way.

V. Orders and directions of a passing nature, in the army, navy, executive departments, or wherever they may be given, are not unfrequently penned in a manner, which admits of and demands interpretation and construction. They are always to be understood with reference to the known and general object of the utterer. In drawing them up, the well-known points are omitted; because the text is not to become the general rule of the actions of many or of successive generations, as is a law. Interpretation and construction must, in these cases, go as far as common sense dictates, at the responsibility and peril of the receiver of the order.[10] The more implicit the order is intended to

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[10] See note 8, to Chap. IV., *ante*, p. 86. — Ed.

be, the more clearly therefore it ought to be worded, yet its subject, or the time at which it is given, is frequently of a character which precludes any extended writing. The orders which Napoleon gave to his chief commanders on the eve of battle, are considered by military men as models of brevity and perspicuity; and yet they make that allowance for free action, which is so indispensable for those who have to execute charges of the highest responsibility. I have been told that the first order which General Scharnhorst issued, in order to arm all Prussia, in the year 1813, was in so small a compass, that his aids could write it on a small parchment tablet. It is evident that nothing essential could have been done, had not those who received this momentous order construed it in the broadest manner, especially when we consider that this very order was issued at a time, when a fearful enemy was yet in possession of a great part of that country, which was to rise against him within a short time.

It may be adopted as a rule, that in high spheres of action, the greater the man, the more distinctly will he indeed give the few essential points, upon which some great action mainly depends, but the less inclined will he also be found to fetter his agents by pedantic minutiæ. See Wellington's dispatches as illustrations. But then, of necessity, these few great points will require proper construction; even extensive, comprehensive construction. So do we likewise find it in dispatches of great statesmen to agents who are treating of a peace. The main points will be given, the minor are left to proper construction, and it will be always found that a plenipotentiary who acts under such a minister, against an agent of a pedantic statesman, will invariably get the better.

VI. *Contracts, Deeds, Wills, &c.*[11] Their construction forms a most important subject of law; but the rules relating to them and to the positive law of every country ought to be given connectedly, in order to be properly understood. They belong to law as their proper province. Whenever the private citizen has officially to decide upon these subjects, it is the duty of the court to charge him in a perspicuous manner, according to his capacity. He is often, however, called upon as a private individual to form an opinion, especially upon contracts and other deeds, and for this purpose it is desirable that some jurist of high eminence should draw up a popular work on the construction of contracts, deeds, and wills. A work of this sort would be of great advantage to the community at large.[12]

I must refer the reader, for information upon legal instruments emanating from private individuals, or establishing certain legal relations between them, to 2 Blackstone, 379, and sequel, and the various places where the commentator speaks of wills; and Kent's Comment. II. 552, IV. 344, 345. In the former place (Kent, II. 552) the student will find several other works referred to, especially Lord Bacon's *De Augmentis Scientiarum*, by a thoughtful perusal of which, the student will do himself a great service.

Wherever a great mind, or many of the most prominent men of a nation jointly, have endeavored to express the essence of laws after mature reflection, we are bound to their attentive study, because their object has been carefully to separate that which is accidental, or transient, from the essential or enduring. In this respect, it will be always

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[11] Upon the construction of these instruments, see Additional Note K, *post* —Ed.

[12] Upon the use of such rules, see Additional Note I, *post*, on the Value of Formal Rules of Interpretation. — Ed.

useful to inquire into the codes of those nations, who, acknowledging the same fundamental views of civilization with ourselves, have severally codified their various laws. Their codes are not the capricious inventions of the closet, but contain the essential principles, which scattered in their accumulated laws, anterior to their codification, are now embodied into one systematic whole. We need not, indeed, on this account adopt the various provisions of these codes; they may be in some cases repugnant to the principles of our civil institutions; but they will always furnish us with ample matter for fruitful reflection, and not unfrequently lead us to wiser opinions, or strengthen us the more firmly in our own. It goes far to prove the truth of a principle at which we have arrived, if we find that it has likewise been laid down, after patient deliberation and careful inquiry into the experience of centuries, by a nation disconnected from our own and grown up under different institutions. In some cases, the evidence even becomes the stronger with the greater difference of the two nations, provided always we can show that the law or principle was not laid down by the foreign nation for some sinister purpose, nor by starting from principles entirely at variance with those which we acknowledge in corresponding cases. This, however, belongs more properly to the subject of authorities, and more will be said of it farther below.*

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* Prussian Code, Part I. Tit. IV. 65, and *seq.* as to Wills. Part I. Tit. XII. 519, and *seq.* Part I. Tit. V. 252, and *seq.*, and Part II. Tit. VIII. 2109, and *seq.* French Civil Code, 1156, 1164, as to Wills, 967, 1035. Austrian Code, the whole 17th Book of Part II. treats of Contracts; the whole of the 9th Book of Part II. of Wills. In the Corpus Juris, the

VII. *Laws.* It has been shown that it is impossible to word laws in such a manner as to absolutely exclude all doubt, or to allow us to dispense with construction, even if they be worded for the time for which they were made, with absolute (mathematical) distinctness; because things and relations change, and because interests conflict differently with each other at different times. The very object of general laws is to establish general rules beforehand; for if we would attempt to settle each case according to the views which, with the momentary interest, it might itself suggest, we should establish at once the most

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Digest under the proper heads, and, with regard to Construction, Lib. 50, tit. XVII. *de diversis regulis juris antiqui*, which will amply repay serious and comprehensive reflection: *legant eos (titulos) studiosi juris, ac relegant, meque sponsore credant, nunquam fore, ut eos impensæ operæ pœniteat. Heineccii Elementa Juris Civilis, ed. quinta, tom.* II. 350.

The Grounds and Maxims of the English Law, by William Noy, attorney general in the reign of Charles I., is a book which ought to be mentioned here. [A new edition of it has been published at Albany in 1870. — Ed.] The student ought not to remain unacquainted with it, because it has some valuable parts, and continues to maintain a respectable place among the English law books — a fact which will always lend historical interest to it at any future period. Yet there is a great lack of comprehensiveness of mind, and philosophical penetration, in this work. It would be a matter of serious regret, indeed, had science, by this time, not far advanced beyond the sphere of Noy's book, and though law, as well as practical life, have improved and thus amended its deficiencies, it is to be lamented that no work has been produced long ago, able to render Noy comparatively useless. The subsequent editions of this book can by no means be considered as having changed the character of the work. I would likewise refer once more to Vattel's chapter on Interpretation; respecting contracts, to Story's Commentaries on Conflict of Laws, pp. 225, 232. [See also Additional Note A, on the Bibliography of Interpretation. — Ed.]

insufferable tyranny or anarchy. By this inherent generality, however, there is a constant reason for requiring construction in the application of laws, since most cases occurring are of a complex character. It is in vain, therefore, to believe in the possibility of forming a code of laws absolutely distinct, like mathematical theories. All that true wisdom requires is to use terms as distinct and perfect as possible, following both the dictates of reason and the suggestions of experience, and carefully to establish rules of interpretation and construction, or legal hermeneutics.[13]

As it has been so often asserted, and to this day continues to be asserted by some persons, that laws ought to be so clear that interpretation or construction can, and, therefore, ought to be abandoned, I feel obliged briefly to enumerate the causes which make this an impossibility. In doing this, I shall be pardoned if, in order to be the clearer on this very important subject, I touch upon a few subjects which have been treated already at length. Yet I at the same time declare my own settled conviction, that the clearest possible laws are an incalculable blessing to a community, and one which extends much farther than merely to the avoiding of unnecessary litigation; whilst obscure or unnecessarily intricate laws are a very curse to a nation, and serve to unite the lawyers into a compact, formidable and privileged class, to be compared only to the priesthood of some nations, ruling the uninitiated. I allude to a state of things such as exists in the Spanish colonies, or in the kingdom of Naples, or in some branches of the British law.

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[13] See Additional Note II, upon Equitable Interpretation, etc. — Ed.

There is a law in the Chinese Penal Code, as translated by Sir George Staunton, — a work which has many praiseworthy traits, — that may fairly be considered as a model of ambiguous laws, to which all others approach, more or less. The Chinese Code says, "Whoever is guilty of *improper conduct*, and such as is contrary to the *spirit* of the laws, though not a breach of any specific article, shall be punished, at the least, with forty blows; and when the *impropriety* is of a *serious nature*, with eighty blows.* This is a law clearly emanating from the spirit which pervades the whole Chinese empire, that the emperor is the father, the whole country but a family — a principle which necessarily always leads to absolutism and tyranny, the moment we go beyond the family, in which affection, not legal rule, gives the measure of justice; while personal affection cannot form a fundamental principle, where personal connexion ceases, and government acts by delegation, as I have endeavored to show ere this.† This ambiguous and dangerous law would be, in its spirit of discretionary power, not in its form of discipline, a perfectly proper family rule.[14]

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* It may be observed here, that the blows, in the Chinese Code, are frequently mentioned as the expression of value, as it were. A fine of so much is substituted for a certain number of blows. They are the pound sterling of penal valuation. However, the compounding ceases with the lowest classes, where real pounding takes place.

† Political Ethics.

[14] Among the difficulties that surround the interpretation of laws, none is greater than that which springs from the injudicious use in them of words of subjective meaning, *i.e.*, those of which the application to an actual case or person must depend upon an opinion in the mind of the judge, or other person interested, not capable of verification by any recognized test. Law is objective in its very nature, and in this quality lies its chief and most fundamental distinction from ethics. It should be ennunciated in terms of the same kind, so that if any dispute arises upon

Interpretation and construction of laws, then, become, or may become, necessary: —

On account of the character of human language, as has been shown.

On account of their ambiguity, arising either from a want of acquaintance on the part of the legislator, with the subject legislated upon, or from contradictions in the law itself.

On account of their application to complex cases.

On account of change of the circumstances and things to which they must be applied, or of the spirit of those by whom they are applied, as was the case with many English penal laws, until very late, which the jurors would not, and could not, apply without ample construction.

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the applicability of its provisions, their true force may not be merely felt or perceived in every man's heart or mind, but may be demonstrated to others by indisputable proofs.

The political value of the last rule is very great, and has been pointed out by the author on page 102. The value of a positive rule of law, in its influence upon the mind of the judge who has to decide a case, as compared with a mere judgment of right and wrong, upon all the facts, is excellently shown by Trendelenburg, § 80.

It was this subjective, indefinable character which formerly distinguished the extraordinary jurisdiction of the English chancellor, who decreed men to do, not what the law ordained, but what they ought in conscience to do. Such conscientious obligation admitted of no uniform standard, but could only be determined by a view of all the circumstances as presented to the judge. Hence, no doubt, the long and bitter opposition made to it by the commons, and the unfavorable comparisons between it and the common law, with its rigid forms and plain, though harsh rules. Selden expressed it in his comparison of equity to the length of the chancellor's foot. Chief Justice Vaughan had it in mind when he marvelled to hear of precedents in equity.

The same is true also of the *æquitas* of the civil law. The essential distinction of law and equity is to be found in the relation of one and the other to their authors and subjects, — in the objective character of law and the subjective character of equity. For law is the will of a state as a power, without reference to its origin. Whether it comes in the shape of a statute, a custom, or a scientific principle, when once fixed as law, it no longer depends on the judgment or discretion of its author, but governs by its own force; in other words, it becomes objective. Equity, on the other hand, has not yet attained that condition; it is dependent on the convictions of its authors, and varies with them; it is the opinion of the citizen, or the body of citizens, on all the questions that may be regulated by law, and on the law itself as regulating them. Moriz Voigt, Das jus naturale, equum et bonum, und jus naturale der Römer. Leipsic, 1856, vol. I., p. 15. — Ed.

On account of their militating, if applied to certain cases, or in certain parts, with more general and binding rules; whether these latter be constitutional, written and olemnly acknowledged rules, or moral ones, written in the heart of every man.

VIII. What has been said respecting all the specific rules applicable to contracts, &c., holds, likewise, in regard to laws. They cannot possibly all be given here; but the most general rules and principles find here a proper place, and, that the reader may have an easy survey of them, a few which have been given already, as rules, applicable to all interpretation, are briefly repeated here.

The student is referred, for a further pursuit of this study, to the 12th chapter of the 5th Book of Pufendorf's Law of Nature and Nations, as, likewise, the 17th Title of the 50th Book of the Digest, which we have cited in the note to a previous paragraph. The principles there laid down by the ancient civilians have, as well as the whole code, materially influenced the common law of England. See Kent's Comment. Lect. XXXIX. 12.[15] See, also, Grotius de Jure Belli et Pacis, Lib. II. Cap. XVI. de Interpretatione.*

The following are the most general rules: —

1. The true meaning of words can be but one.

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* I would refer, likewise, to the works and places mentioned in the previous section; also, to the article on the Interpretation of Law, in the London Law Magazine, No. 36, &c. [See also Additional Note A, on the Bibliography of Interpretation. — Ed.]

[15] Vol. II., pp. 552-557 of Holmes's (12th) edition. — Ed.

2. Honest, faithful, *bonâ fide* interpretation is all important; common sense must guide us.

3. Words are to be taken according to their customary, not in their original or classical, signification.

4. The signification of a word, or the meaning of a sentence, when dubious, is to be gathered from the context, or discovered by analogy, or fair induction. Yet a word does not always have but one meaning in the same discourse or text. This would, in fact, militate with the important rule, that we are to take words in their natural sense, according to custom and their connexion.

5. Words are always understood as having regard to the subject-matter.

6. The causes which led to the enactment of a law are guides to us. If one interpretation would lead to absurdity, the other not, we must adopt the latter. So, that interpretation under which the effect, which the legislator had in view, will best be attained is preferable to another.

For the above rules see Blackstone and Pufendorf. As to rule 6, see Dig. Lib. 50, tit. 17, 67.[16]

7. Two chief objects of all government are peace and security; the state can never be understood to will any thing immoral, so long as there is any doubt. Laws can-

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[16] Quotiens idem sermo duas sententias exprimit, ea potissimum excipiatur quæ rei gerendæ aptior est.

The gloss illustrates this by a law respecting natural children (Pr. Inst. de adopt. I., 11), the term "natural" being sometimes opposed to "adoptive," sometimes to "legitimate," and concludes thus: Et hoc dicitur aptior expositio, ut res valeat potius quam pereat et non sit contraria juri

Where the language of a remedial statute is doubtful, or will bear two interpretations, the court will give that which will best promote the remedy intended by the legislature. Rockford, Rock Island & St. Louis R. Co. *v.* Heflin, 65 Ill. 366.

not, therefore, be construed as meaning any thing against the one or the other. Public security and morality are the supreme law of every land, whether this be expressly acknowledged or not.

8. The general and superior prevails over the specific and inferior; no law, therefore, can be construed counter to the fundamental law. If it admits of another construction, this must be adopted.

Lord Coke was for holding laws void that were *contrary to reason*. Chancellor Kent says, Comment. I. 448: "But while we admit this conclusion of the English law (namely, that the will of the British legislature is the supreme law of the land, and demands perfect obedience,) we cannot but admire the intrepidity and powerful sense of justice which led Lord Coke, when chief justice ot the K. B., to declare as he did in Doctor Bonham's case, that the common law doth control acts of parliament, and adjudges them void when against common right and reason. The same sense of justice and freedom of opinion, led Lord Chief Justice Hobart, in Day *v.* Savage, to insist, that an act of parliament made against natural equity, as to make a man judge in his own case, was void; and induced Lord Chief Justice Holt to say, in the case of the City of London *v.* Wood, that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying. Perhaps what Lord Coke said in his reports, on this point, may have been one of the many things that King James alluded to, when he said, that in Coke's reports there were many dangerous conceits of his own, uttered for law, to the prejudice of the crown, parliament, and subjects." No doubt, they are dangerous to the pretensions of a king

whose arrogance was equalled by his want of judgment, courage, honesty and decency.[17]

[17] Coke's own words in this celebrated case (Bonham's Case, 8 Rep.) are: "And it appears in our books that, in many cases, the common law will control acts of parliament, and sometimes adjudge them to be absolutely void; for, when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void; and, therefore, in 8 Edw. III., 30 a, b, Thomas Tregor's Case, on the 2 Stat. W., c. 38, *et artic. super chartas*, c. 9, Herle saith, some statutes are made against law and right, which those who made them perceiving, would not put them in execution." 8 Co. 234. And he illustrates this by several cases; in every one of which the question was, not as to the validity of a statute as a whole, but as to some particular application of its terms. Thus, Coke concludes one of his illustrations with the words: "And because it would be against common right and reason, [for the heir to have a *cessavit* for the cesser in the time of his ancestor, *vide* F. N. B. 209, F; Plow. 110 a; 2 Inst. 442; 2 Brownl. 265] the common law adjudges the act of Parliament *as to that point* void."

A collection of the comments made by different English judges and writers during the two last centuries upon this doctrine of Coke's, would be very instructive in its bearing upon their theory of interpretation, and of law in general. One or two examples must suffice here. In Blackstone's (1 Comm. 91) present text we read: "Lastly: acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions, though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power *in the ordinary forms of the Constitution that is vested with authority* to control it; and the examples usually alleged in support of this sense of the rule do none of them prove that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature," etc.

It is worth noting that the words above quoted in italics were not in the first editions of the Commentaries, but were added some time between the fourth edition (1770) and the ninth (1783), which was edited, after the commentator's death, by R. Burn, and contained the author's last corrections. Any one who has examined carefully the earlier editions must have been struck with the number of minute corrections which Blackstone made, from time to time, in them. A critical edition, showing all these changes, would be of substantial value for the history of English law.

But even this cautious statement was denied by Blackstone's most careful, and, all things considered, perhaps his ablest commentator, Prof. Christian, who says, in his note to this passage: "If an act of Parliament is clearly and unequivocally expressed, — with all deference to the learned commentator, — I conceive it is neither void in its direct nor collateral consequences, however absurd and unreasonable they may appear." And in another note, to the passage in which Blackstone asserts that no human laws are of any validity if contrary to the law of nature (1 Comm. 41), Christian makes this strong statement: "And if an act of parliament — if we could suppose such a case — should, like the edict of Herod, command all the children under a certain age to be slain, the judge ought to resign his office rather than be auxiliary to its execution; but it could only be declared void by the high authority by which it was ordained!" It has also been suggested that Blackstone had in mind private acts; as to which, see 2 Comm. 316. But if this passage were

Our courts have repeatedly declared laws void as being against the constitution. For the various American cases, confirming this necessary doctrine in all countries, in which there is a constitution, see Kent's Comment. Lect. XX., where the commentator speaks in just terms of that beautiful argument delivered on this vital question, by Chief Justice Marshall, in the celebrated case of Marbury *v.* Madison (1 Cranch, 137), — an opinion which is of the utmost importance in the constitutional history of mankind.

9. A law contrary to the fundamental or primary law, may at any time be declared so, though it has already been acted upon; for "that which was wrong in the beginning cannot become valid in the course of time." Dig. Lib. 50, tit. 17, 24, and —

Quod ab initio non valet, id tractu temporis non convalescet.[18]

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intended to be merely equivalent to that, it need not have been so carefully qualified.

Mr. Serjeant Stephen, in his Commentaries, founded on Blackstone, has omitted the passage altogether; and Broom and Hadley, in theirs, have substituted for Blackstone's statement, that the acts "are, with regard to those collateral consequences, void," the phrase, that "a more liberal construction would be put upon it, [the act] so as to avoid, if possible, such collateral consequences." Blackstone's Commentaries, rewritten by Broom and Hadley. London: 1870. Vol. I., p. 94.

Finally, the power has been repudiated from the bench, in strong terms, by Lord Campbell, C. J., K. B., in Woodward *v.* Watts, 2 El. & Bl. 458.

Lord Campbell had expressed himself extra-judicially on the same matter in his Lives of the Lord Chancellors (vol. II., p. 373; vol. VI., pp. 251, 329, 374), and quotes, in these passages, interesting *dicta* upon it by Ellesmere, Hardwicke, Camden, Northington, and Mansfield.

For other discussions of it, beside the references to the older books collected in 8 Coke —, and in the notes to 1 Bla. Comm. 41, 91, see Forbes *v.* Cochrane, 2 Barn. & Cress. 448, 471; Ham *v.* McClaws, 1 Bay, 93 (a distinct judicial recognition of the doctrine laid down by Coke); Vattel, Book I., chap. 3, §§ 33, 34; Bowyer's Universal Public Law, pp. 273, 285, 305, 344; Lindley's Thibaut's Jurisprudence, note to § 11. — Ed.

[18] It does not, however, follow from this rule, as has sometimes been claimed, that a court would violate its oath to support the Constitution, if it should follow a formal decision interpreting it, on the principle of *stare decisis*, against its present convictions as to its true meaning.

"The court, therefore, which follows a decision once made upon a constitutional question, in obedience to this maxim, is no more obnoxious to the charge of setting

This does not militate with the other maxim given by Noy that, Communis error facit jus.[19] This is true so long as the communis error is not acknowledged as such, and if we do not understand by *jus* an immutable thing, but some thing which, on proper grounds, may be declared to be non-jus. Else, should it have remained forever *jus* to burn witches? Common, assuredly, the error was, for it has been computed that, in the whole, nine millions five hundred thousand beings were sacrificed as witches or wizards, not to mention the countless victims of the most barbarous torments.*

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* The Revelation of God, &c., by Henry Stephani, D.D. 1835 (in German), 1 vol. page 194. Dr. Stephani computes, of course, the number of the victims of witch trials in Christian countries only.

aside the Constitution upon grounds of policy than if, in obedience to the same maxim, it should follow a decision upon a statutory question, contrary to its own views, it would be obnoxious to the charge of disregarding the law on grounds of policy. The court is as clearly bound to enforce the law as it is the Constitution. But in giving due effect to the maxim of *stare decisis*, though its own views would be different, it disregards neither the Constitution nor the law, for both intended that this maxim should have due effect in the judicial system which they established. The question is, did the Constitution itself intend that each judge should, for all time, decide upon his own interpretation, according to his own views, as though no decision had ever been made; or did it intend that such decisions, once made, and acted upon by the people, so that change would overthrow all the transactions of the past, should be followed by succeeding judges? Obviously the latter. It is not to be expected that any express provision should be found in the Constitution enjoining obedience to the maxim. But it was an established, unquestioned principle in the English and American law, and every constitution must be assumed to have contemplated its existence, and to have intended its enforcement. The judge, therefore, who follows a decision once made, and so long acted on, that a just application of this maxim forbids a change, although his own views of the question, if new, would have been different, is not disregarding the Constitution, but obeying it within its true intent and meaning." Kneeland *v.* Milwaukee, 15 Wis. 691. — Ed.

[19] *Communis error facit jus* is found in Coke's Fourth Inst., p. 240: "And because all the judicial precedents were in that form ever since the making of the statute, it was adjudged to be good, for *communis error facit jus.*" See also Broom's Leg. Max. 104, Chap. 3, § 2.

But the original meaning of the maxim seems to be different from that in which it is taken here. *Communis* there does not signify general, popular, but rather, in a strict sense, common to the parties interested. When all the parties to a transaction have been under a similar mistake as to their rights, these are taken to be such as they have supposed them, and acted on them. — Ed.

10. If, therefore, the law admits of two interpretations, that is to be adopted which is agreeable to the fundamental or primary law, though the other may have been adopted previously.

11. Custom of the country wherein the law was made supplies the deficiency of words.

12. In dubious cases, the fairer interpretation is to be adopted. "Every where, especially in law, equity is to be considered." Dig. Lib. 50, tit. 17, 90, 192, 200.

13. That which is probable, or customary, is preferable to that which is less so, wherever obscurity exists.

14. If two laws conflict with each other, that must yield, the effect of which is less important; or that is to be adopted, by the adoption of which we approach nearest to the probable or general intention of the legislator. Specific rules, adopted for the protection of private individuals, must be followed.

Whether the laws were made by the same legislator, or body of legislators, or not, does not alter the case. For the legislative power in a state is continuous, always aiming, or supposed to aim, at the public welfare.*

15. The more general the character of the law is, the more we ought to try strictly to adhere to the precise expression. Without observing this, the law would be a wavering, instead of a stable rule, and we must presume that the words have been the better weighed, when a more general effect has been intended. Many considerations, however, may exist which would oblige us to follow a

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* See Puffendorf's instance of two men arriving at the same time at the gaol, or the conflicting laws with regard to a woman who had deserved a statue.

different course, *e.g.* the cruelty of a law, its antiquity, and consequent unfitness.

16. If any doubt of the meaning exists in penal laws or rules, they ought to be construed in favor of the accused; of course, without injury to any one else.[20]

17. As between the government and an individual, the benefit of the doubt, all other reasons being equal, ought in these cases to be given to the individual, not to the authority; for the state makes the laws, and the authority has the power; yet it is subversive of all good government, peace, and civil morality, if subtlety is allowed to defeat the wise object of the law, or if a morbid partiality for an evil-doer guides the interpreter.

18. The weak (hence the individual arraigned by the state) ought to have the benefit of doubt; doubt ought to be construed in mercy, not in severity; a law may be rendered milder, but not more severe.

IX. *Constitutions.* Constitutions are always laws and guarantees—"sponsio communis"—the fundamental and organic law, and in many cases they are actual and solemn pacts and covenants. In another work I have endeavored to show, that in countries in which the rulers do not directly come from the people and periodically return to them, but, on the contrary, are as to their appointment removed beyond the influence of the people, in all hereditary governments, but especially in monarchies, constitutions are always in a certain point of view to be considered as contracts between the people, on the one side, and the ruling race or dynasty, on the other, whether nominally

[20] See Additional Note J, on the Interpretation of Criminal Law. ED

made as contract or granted by the monarch, so long as either party insists on the maintenance of the constitution, and does not allow the other party to break it. The preamble of the instrument does not change the matter, and the French charter granted by Louis XVIII. was a solemn compact so long as each party repelled the aggressions of the other; and when the party of the rulers finally came to invalidate the constitution in some of its vital points, the nation did not reason on the ground that, as the king had given it, the king might take it, but that the charter is a solemn covenant, and to subvert it is subverting the very foundation of government, throne and all. So in remodelling the charter we find among other things a declaration "that the throne is vacant de facto and de jure," substituted for the previous preamble in which were the words: *Nous*, that is, the king, *avons volontairement et par libre exercice de notre autorité royale accordé et accordons, fait concession et octroi à nos sujets*, &c.*

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* In French, a constitution, nominally or really granted from the mere grace and good will of the ruler, is called *octroyée*. Hardly had I published in the article Constitution, in the Encyclopædia Americana, the following remarks, when the French revolution of 1830, proved that all France took the same view. "A chartered constitution, or *constitution octroyée*, partakes much of the nature of a compact, as soon as the people have sufficient spirit and sense of justice to prevent it from being infringed or abolished, and, asserting the natural rights of men, whose rulers exist only for their benefit, avow that they will submit to the government only as long as the government observes the constitution. In fact, a constitution *octroyée*, in any case, can hardly be regarded otherwise than as a compact, proceeding, as it does, from the wants of the times and the demands of the people, and expressing the intention of the ruler to observe certain rules, which these wants and demands prescribe. Where

Some constitutions assume more or less the distinct character of a contract, or even that of a treaty, made by contracting powers, such as the constitution of the Germanic confederacy; others are general rules which have been settled and expressed, as much in order to lay down general principles of action, so that disorder may be prevented, and every citizen may know what he may safely do, and what he ought to avoid, as to limit the power of those in authority, that they may not make improper and dangerous use of it. This is the case with the state constitutions in the United States.

If we survey all political constitutions with reference to our subject, we shall find the following classes: —

Constitutions which consist of a declaration of rights, whether freely established by the people, or granted by the authority, or wrung by the former from the latter, and of certain broad principles, which are to be observed in governing the people; but not of a description of the form of government, and a limitation of the various

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would be its value, how could it be regarded as a fundamental law, controlling the operations of the government, if it were liable to be abolished at any moment, at the pleasure of the sovereign? That the monarch acted from compulsion in granting the constitution, only proves that the character of the times made it indispensable. The French ultras are grievously mistaken, when they pretend that the king may abolish the *Charte* because he granted it. It is not the words with which it is prefaced, but the circumstances under which it was given, that are to determine its character. It was granted to satisfy the demands of the French people, and as a pledge for the security of their liberties; and as long as they hold to the grant, it is impossible for the ruler to recall it. Such a constitution, therefore, may be considered as resting virtually on a compact."

authorities thereof. The English declaration of rights is of this class, although the law and custom deposited in the long history of England form a very detailed constitution.

Constitutions which aim at defining the government and its powers and are the emanation of the sovereign will of a whole state or nation.

Constitutions which are formal compacts between a nation and a ruling race. They originate when a family, not fully or clearly entitled to the throne, is called to occupy it on the distinct understanding contained in the constitution. Such was the case with Louis Philippe, king of the French, Leopold, king of the Belgians, Bernadotte, king of Sweden, and several others. Or they may originate after civil strifes between the people and their rulers, and, in these cases, are laid down as the distinct compact on which, for the future, the two parties are agreed to support and protect each other.

Constitutions which consist in formal compacts between contracting powers independent of each other before the conclusion of the compact, wherein distinct points are granted and limits defined; as was the case with the United Provinces of the Low Countries, and is the case with the United States of America, the cantons of Switzerland, and other confederacies. These latter constitutions will always be more or less affected by a most powerful element, which nevertheless may be, strictly speaking, extra-political, namely, by the principle of nationality. A confederacy may consist of sovereign members, and yet language, religion, common civilization, common origin, in short a common history, may furnish most powerful ties

and influential elements besides the pronounced and strictly acknowledged political ties of the union.[21]

X. In considering the construction or interpretation of constitutions, it is necessary to mention, once more, that, wherever human language is used, interpretation or construction becomes indispensable, even with regard to constitutions. The constitution of the United States says: that congress shall have the power of regulating commerce, but it does not say how far this regulatory power shall extend. This sentence, then, must be interpreted, if we are desirous to ascertain what precise meaning the framers of our constitution attached to it, and construed, if we are desirous of knowing how they would have understood it respecting new relations, which they could not have known, at the time, and which nevertheless fall decidedly within the province of this provision. The many debates, at various periods, on this very provision, sufficiently prove that it is differently understood by different men and parties, and that conscientious construction is called for. The question is not, shall we construe at all? but: what are the general rules of political construction which may be safely followed?

To argue, as has been done, that the necessity of construction shows the futility of constitutions, is altogether inadmissible, for it would equally apply to any law whatever, to all contracts and wills, to any human language, and to the bible no less than to political codes.

The following rules appear to me the most essential in constitutional hermeneutics: —

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[21] See Additional Note M, on Unwritten Constitutions. — Ed.

1. A primary rule, suggested by mere common sense, yet so frequently abandoned, both in religion and politics, and always the more flagrantly the more men are obliged, by the unsoundness of their view, to resort to special pleading, is, that we ought not to build arguments of weighty importance on trifling grounds; not to hang burdens of great weight upon slight pegs; for instance, an argument of the highest national importance upon the casual position of a word. This rule applies, indeed, to all and every construction, but it naturally becomes the more important, the more important the sphere in which we have to construe.

2. If no genuine construction of any text whatever can take place without good faith and conscientiousness, it is most especially the case with regard to politics; for no human wisdom can possibly devise an instrument that may not be interpreted so as to effect any thing but that for which the constitution was established and its fundamental principles laid down. We gain nothing by verbosity, or a minute enumeration of details; for a constitution is to apply in every sphere of political action and hold good for many generations. If we attempt, then, to detail every thing before hand, we only impede, fetter, and obstruct. Experience has fully proved this. On the other hand, if the constitution contains only the great principles and general outlines of the state, faithless interpretation has free play. Where, then, is the essential guaranty of liberty? No where, if not in the breast of the citizen. Constitutions are useful, and indispensable in order to arrive at a clear understanding on the most important subjects of society, and a manly knowledge of that all-important element of

law and civil liberty — the relation of the individual to the political society in the aggregate — the state, as well as for furnishing to an independent judiciary a fulcrum to rest its lever on, in opposition to laws hostile to that true relation of the individual to the state, and which otherwise must crush the individual. But constitutions do not make liberty; liberty is not decreed in so many words on parchment. That parchment, with its ink upon it, may be eaten by the worms, may be torn by any daring hand. They are superior to such contingencies when they are but the solemn pronouncing and expression of that which lives within the nation, the written words of the living essence.

Under the best constitution, political crimes and offences of all sorts can easily be committed, as soon as the spirit of the people allows those in power to construe it for that purpose; and a people animated by a manly spirit may force those in power to construe an unfavorable constitution or a dangerous prerogative custom, agreeably to the civil spirit which animates the whole society Imagine the English constitution with a lax, yielding, degenerate or servile people. Is it necessary to imagine? Look at the history of Henry VIII. What is there that a minister might not do, if he had a mind to betray his nation and if the people would let him do it, without in one single instance acting against the letter of the law of Great Britain. So far as the words go, the privileges of the crown are immense. The very efficiency of parliament hangs by very slender threads. as to the words or forms of the constitution; but can a minister discard parliament? The whole history of James I. and his successor is but one continued commentary upon the fact, that faithless inter-

pretation and construction will be able to defeat the true object of almost any form of words.

It is, as was alluded to already, not otherwise in religious doctrine. We must do to others as we wish others to do unto us. Faithless construction might say, I wish to lead a life of licentiousness, and am perfectly willing, nay, desirous, that others should lead it.

Blackstone, in the fourth volume of his Commentaries, in a note to page 439, says, with great naïveté: "The point of time at which I would choose to fix this *theoretical* perfection of our public laws is in the year 1679; after the *habeas corpus* act was passed and that for licensing the press had expired, though the years which immediately followed it were times of great *practical* oppression." The italicising is not my own; yet the commentator has marked them as if to illustrate the above rule.

The constitution of the United States bestows upon the president prerogatives, which might deprive the people of all liberty, the moment they should become indifferent enough to allow it. Nor do I say that less power ought to have been conferred upon the American chief magistrate. It would be a great mistake to suppose that any thing would be gained by merely tying the hand of the executive; then the power would be somewhere else, and equally obnoxious to abuse.

3. The principle, that "the general prevails over the particular,' is of great importance with regard to constitutions; it amounts to saying, that the "public welfare is the supremest law of every country, is above the supreme law." Even the Chinese, "that nation of incurable conservatives." in their four sacred books,

acknowledge literally the principle, "salus populi suprema lex."*

There can be no construction, therefore, contrary to this law of laws, or vital principle of every law, all appearance to the contrary notwithstanding. No prerogative, no privilege can exist against public welfare; but, in acknowledging this, we must take great care that we do not fall into two serious errors. First, we must have a proper conception of the public welfare, and not understand by this term, as is frequently the case, only physical prosperity, high prices, good wages, flourishing commerce, &c., for though these are concomitant parts of real public welfare, yet they are by no means its only elements, or only tests. They have been, in not a few instances, the dangerous guise under which absolute power and oppressive tyranny have stolen into the mansion of public liberty. Nothing, indeed, is more common than that usurpers promote industry and commerce. They are generally wise men who know the great value of national activity, and, apart from their ambitious plans, are frequently men of lofty and noble dispositions, not naturally inclined to harm others, though ready to do so when prompted by their aspiring views. Secondly, we must guard ourselves against mistaking our private views and interests, our passions and appetites, for public wishes or demands; in short, against confounding our individuality with public welfare. This applies to citizens as well as rulers, to each one in his sphere, and naturally so, for all are the same compound beings.

* Davis's Chinese, London, 1836, vol. 2, the chapters on Confucius, Religion, &c.

There have been few usurpers or political transgressors, on a large or small scale, who did not protest that they had disregarded the law of the land, or the acknowledged principles of civil liberty, because public welfare demanded the violation. It was alleged as one of the principles on which Ernest of Hanover founded his revolutionary act which annulled the constitution of the land. Yet it remains true on the other hand, that those states are doomed to decline and fall to ruin, which endeavor to rule by ancient laws and forms only, and obstinately resist the progress and spirit of the age, as if the public mind could be encircled or checked by oral or written sentences.

Those Danes were right, therefore, who maintained that that most curious of all fundamental laws, by which, in the year 1660, the king was made, by desire of the people, "hereditary and absolute sovereign," and according to which no fundamental laws should have any force, except the one, that nothing should bind the king — that even this law had a meaning only by tacitly supposing that the king would use this power for the welfare of the people.[22]

4. Constitutions should, in ordinary cases, be construed

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[23] But the same defence would apply equally well to the *lex regia*, upon which our author has commented so severely, *ante*, p.39, and which has always been so hateful to the English people that it alone was regarded as an all-sufficient argument against the adoption of the civil law in the times when such an adoption might be regarded as a possibility. Perhaps it is hardly fair to attribute the great difference between the careers and the present positions of England and Denmark to the different attitudes of their people toward this principle, since many causes have combined to produce the present power of England and the present weakness and humiliation of the kingdom of which she was once, for a short period, a dependency; but there is abundant evidence in Danish history of the truth that a people which will not make the exertions and submit to the burdens which form the price and condition of self-government and liberty, will look in vain for welfare at the hands of an absolute monarch. This statement may seem a truism, rather than a great truth; but it cannot be too often repeated in a generation, of which the educated and wealthy classes are more alive to the defects than the value of free institutions. — ED.

closely, because their words have been well weighed, and because they form the great contract or agreement, between the people at large, or between the people and their ruling race. It matters not, as has been stated, if the constitution declares that it is a free gift of the sovereign's bounty, as did the French charter of Louis XVIII. ; for, on the one hand, as soon as the people accept of it, and as long as they insist on it, it is a *boná fide* contract ; and on the other, it is well known that no sovereign grants a charter, except when circumstances require it. The very charter proves it.

5. The more a constitution partakes of the character of a solemn compact, the closer its construction must be ; for we have no right to construe or interpret otherwise, if there are several parties. Construction of federal constitutions, therefore, ought to be close ; especially if they distinctly pronounce that the authority and power granted therein is all that is granted, and that nothing shall be considered as granted, except what is mentioned : as is the case with the constitution of the United States of America in granting power to the national government.

6. All the rules which relate to precedents demand peculiar attention in the construction of constitutions. For, on the one hand, one of the great objects of government is security and peace, which includes stability, by which is meant not only the absence of revolutions, but also the certainty of rights and of legal as well as political relations ; on the other hand, an unfortunate concurrence may cause a law to be passed, and the people to acquiesce in it ; yet, if every law or measure adopted on the ground of strong expediency were always elevated to a principle,

it would frequently thwart some of the most important objects of the constitution itself.

We should follow in this particular the Digest, which declares, as one of the *regulæ juris*, Lib. 50, tit. 17, 162, quoted before, that "That which has been adopted from necessity cannot be applied to similar cases." See farther below on Precedents.

7. Transcendent construction may sometimes be resorted to, regretting the necessity which obliges us to make use of it, instead of seeking how we may contrive to justify a transgression of power, or stretch the constitution to obtain it. We ought ever to be mindful that every transcendent construction may be the beginning of fearful inroads.

8. As we may interpret a will with greater freedom than a contract, and a contract, if it relates to a few who concede, more comprehensively than a law which has general effect, so we may construe a law with more freedom (provided no party be injured thereby) than a constitution; for the latter contains the most general rules applying to all. It is calculated for relations in which every one has a common interest; and as the interests common to all in a large community must be less in number than those which may be equally shared between a few persons, a strict adherence to the constitution is necessary to maintain the universality of its application and secure uniformity in its effect.

9. Seek for the true spirit pervading the whole constitution and interpret in good faith accordingly, provided this spirit is in favor of public welfare, which is not the case with all constitutions, and provided the instrument be not irreconcilable with the present time, for instance, by having been established in past ages, and conceived in a spirit

which has long been supplied by a characteristically different one.

Constitutional history proves that it is of moment that the speaker of the popular house should not only be eligible by the house, but also be independent of the crown; for a speaker without considerable power impedes, rather than promotes, the business; but if this influential person is dependent upon the crown, the liberty and usefulness of the house is greatly injured, as we see illustrated in the periods of the Jameses and Charleses. The French charter of 1830,[23] therefore (article 37), took from the crown the power of confirming the president of the deputies, which it had, according to the charter of 1814. The speaker of the British commons, however, must be confirmed by the crown, according to the received understanding of the existing constitution, though, of course, the royal privilege has not been acted upon for a long time. Suppose a minister should advise the crown to disapprove the choice of a speaker on trifling grounds, it would be right for the commons to remonstrate, and to justify their action by a most comprehensive construction of this privilege, namely: that it had not been acted upon for many years; that it is against the present spirit of liberty; that the French have seen fit to abolish it, and that they, the Commons, have not proposed a law to rescind the privilege of the crown because its exercise, unless on very momentous grounds, was understood to be antiquated.

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[23] The charter here referred to will be found, at length, in Appendix XII. to the author's Civil Liberty (ed. of 1875), pp. 545–554, and is followed there by the French Constitution of the year 1848, and the Constitution and *Senatus Consultum* of 1851-2, by which that republic became a second empire. — Ed.

It was the misfortune of the French nobility that a part of them insisted upon their privileges, as established by the ancient law, though many of them were excessively burdensome and galling to the people.

10. But if the constitution itself provides for its being lawfully changed, this necessity exists in a far less degree Still it exists; the case supposed in the previous paragraph is in point. No constitution has easier remedies provided for than the British, inasmuch as Parliament is, according to constitutional terminology, "omnipotent," and a statute may at any time change the most essential feature of the realm. Parliament might, if public opinion would allow them, abolish the *habeas corpus* act forever.[24]

11. If the constitution acknowledges the necessary rights of the citizen, civil liberty is benefited by close interpretation as the rule and comprehensive as the exception only; because the former defines and settles, and thus allows a distinct and traditional knowledge of the civil rights to grow up and infuse itself deeply, and in a thousand directions, into practical life; so that the body of citizens is animated by civil steadiness and manliness, and a deep-rooted love of justice, which teaches them to esteem each other's rights, because they know them.

But if civil liberty and security themselves have grown up only by continued comprehensive construction in favor of civil liberty of old laws, which, for some reason or other, are not changed, or which it may not even be desirable to change, this comprehensive construction is most important. In short, with a manly nation, let every thing that is in

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[24] See Additional Note M, on Unwritten Constitution.—ED.

favor of power be closely construed; every thing in favor of the security of the citizen and the protection of the individual, comprehensively, for the simple reason, that power is power, which is able to take care of itself, and tends, by its nature, to increase,* while the citizen wants protection. For the same reason we ought always to be ready to construe comprehensively in favor of the independence of the judiciary and against the executive: because it is all-important that the judiciary be independent, while it has none of those many influential means of the executive; no pageantry, no honors to bestow, but few salaries to dispense, no army, navy, orders, crosses, titles, lawns, or grants of land at its disposal. It rests only on public opinion — a mighty power, indeed, if it chooses to act, or is not crushed. Hence it must be shielded.

An attentive observer of the political course of France, during the last half century, has probably nothing to deplore so much, as the habitual unsteady construction put upon her fundamental laws by all parties, so that few debates occur in the chamber, on any important subjects, in which recourse is not had to the very first principles of government which lie beyond the constitution, we would almost say, to political metaphysics. The enormous administrations which preceded the Revolution, as far back as that of Louis XIV. had rooted up every civil principle and prevented any steady growth of civil liberty. Absolute governments, whether brilliant or not, have always this effect. Their nature causes it. If a people trusts to

* Political Ethics, vol. I. on Public Power.

personality, its institutions will be undermined. Louis XIV. was considered with a feeling of national vanity, le grand monarque; he died, and in what condition did he leave France? The reign of Elizabeth, which cannot be denied to have been glorious, tried some of England's institutions severely, because she was so popular. James came and tried to do the same, or exceed his predecessor, without having her superior judgment — a revolution ensued; Athens trusted to Pericles and his personal qualities — great, indeed — and neglected her institutions, and when death deprived them of a Pericles, they must allow themselves to be ruled over by a Cleon, the currier. The reign of Frederic William II. after Frederic the Great, might even be mentioned as not without bearing upon the subject.

Of the construction of those two important privileges — the veto and the pardoning power — conferred by many constitutions upon the chief magistrate, I have treated in the second volume of the Political Ethics.

XI. One of the most important subjects for interpretation and construction are international treaties. Their very importance and the extensiveness of the subject, as well as the fact that it has been treated of in various works, induces me to dismiss it here, after one remark only, namely, that treaties being most essentially founded upon good faith, for there is no superior power to enforce them, they require, likewise, most urgently, the same principle in construing them. Happily, it has been found that it is also the most politic way of proceeding. Honest diplomacy is vastly preferable, even on the mere

ground of expediency, to that species in which Louis XIV. was such an unwearied adept.

See Vattel's Law of Nations, chap. XVII.; Grotius, Puffendorf and Wheaton on International Law.[25]

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[25] More recent, and, in some respects, still more valuable treatises on the subject, are: An Introduction to the Study of International Law, by Theodore D. Woolsey, late President of Yale College (New York, 1864. Fifth edition, revised and enlarged, 1879); and Commentaries on International Law, by Sir Robert J. Phillimore, now judge of the Admiralty Division of the English High Court of Justice. — Ed.

CHAPTER VII.

Precedents — Definition — Natural Power of Precedents — Power of Precedent in England — Reasons of the Powerful Influence of Precedents — "Wisdom of our Forefathers" — Lineal Assent, Contemporary Assent — Great Force, for Good or Evil, of Precedents in Politics — Reasons — Distinction between Legal and Political Precedents — Precedents of a mixed Character — Precedents necessary for the Development of Law for Civil Liberty — They settle the Knowledge of what is Law — Necessary Qualities of sound Legal Precedents — Executive Acts are no Precedents, except for Subordinate Officers, if not against Law — Fearful Instance of Executive Precedent in the History of the Star-Chamber — No Man shall take Advantage of his own Wrong — Sound Precedents — Precedents must be taken with all their Adjuncts — No Precedent weighs against Law and Right — Still less against Reason — Precedents must not increase Public Power — Precedents must settle, not unsettle — Precedents may be overruled if necessary — The greatest Lawyers have done so, for instance, Lord Coke.

I. In settling that which is uncertain, in law and politics, and, to some degree, in other spheres to construction, great aid is derived from precedents and authorities. I shall treat first of precedents.[1]

A precedent, from *præcedere* to *precede*, to move before, is a case, which having happened previous, is yet analogous to, or, in its characteristic points, the same with another

[1] For notes upon the subject-matter of this and the following chapter generally, see Additional Note N, on Precedent and the Doctrine of Authority in the Law. The editor has thought it at once more respectful to the author, and more convenient for the reader, — at least, for such readers as belong to the legal profession, — to put together his notes and additions to the text upon this subject, in the form of a single essay, rather than to divide them among the different passages of the text to which they might seem more directly applicable. This arrangement seemed the more desirable, because he felt himself obliged, as a lawyer, to dissent somewhat from the fundamental view of the doctrine of precedent taken by Dr. Lieber, who did not belong to that profession. — Ed.

before us. In law and politics, in particular, precedents signify decisions, proceedings, or a course of proceedings, which may serve for a rule in subsequent cases of a similar nature.

The important question is, have precedents any binding power? Ought they to have any binding power where it has not been settled that we are to follow them? And if they bind in any case, why and under what circumstances? Before these questions can be answered, it is necessary to look into the nature of precedents.

II. Precedents possess a natural power, that is to say, we find that they every where exercise a considerable influence upon the judgment of men, in private as well as public life; it is now and always has been the case, with barbarous tribes as well as civilized nations. If a child is chid for some act or other, it thinks to find some extenuation, if it can assert that another child has done the same. When the ministers of Louis Philippe, king of the French, a few years ago issued an ordinance respecting the erection of some fortifications around Paris, they cited a similar one issued as early as under Louis XIV. The most absolute chiefs of semi-civilized tribes are pleased to find rules for their acts, in the examples real or pretended of their forefathers. Few arguments have a greater weight with all early nations, than the assertion of some old and experienced man, that he remembers the father or grandfather of the chief or king to have acted thus or so in a similar case. Hardly any measure of government is recommended by the administration papers in free countries, without pointing to a similar and previous case; and if no argument can be found to make an unpopular measure

palatable, or to extenuate some act of the executive, this one of recurring to previous cases, if argument it can be called, is sure to be resorted to. When the British commons struggle with their king for liberty, nothing gives them so firm and solid a support as the ability to stand upon a precedent. On what, indeed, did the commons rest their rights in the beginning of their great struggle with Charles I., except on precedents? So powerful is precedent in that country, foremost in the history of constitutional development, that in high constitutional questions of the use of power, the absence of precedents is, frequently, of equal weight in condemning. When Earl Danby, under Charles II., was impeached of high treason and pleaded the king's pardon in bar of the same, the commons alleged "that there was no precedent that ever any pardon was granted to any persons impeached by the commons of high treason, or other crimes, depending the impeachment," and thereupon resolved, "that the pardon so pleaded was illegal and void, and ought not to be allowed in bar of the impeachment of the commons of England;" but they supported their resolution by the reason, "that the setting up a pardon in bar of an impeachment, defeats the whole use and effect of impeachments; for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of government would be destroyed."* On the other hand, no claims of the crown

* Soon after the revolution of 1688, the commons renewed their just claim, and at length it was enacted, 12 and 13 William and Mary, c. 2, that no pardon under the great seal of England shall be pleadable to an

were so powerful at the most critical periods for British liberty, as those supported, in truth or pretence only, by precedents.

Whence does this natural and universal influence and authority, often salutary, often fearful, ascribed or tacitly yielded to precedents, arise? From various reasons, as the following may show.

III. By citing a precedent, we at once become followers and cease to be leaders; our responsibility, therefore, seems to be divided, or at any rate it is shared by some one else. We no longer appear as innovators; there are at least two that have done the same thing. On doubtful points of high importance, especially in constitutional matters, we may by a precedent, leave the high seas of theory, and cast anchor in the solid ground of practical life. We moor in reality; and it requires an additional power to weigh anchors, which, for good or evil, have buried their flukes in substantial ground.

If nothing disapproving has been said or done, when a measure took place, we construe silence into tacit assent, tacit permission. Of many actions, however, we can, from their nature, know only that they have been done, but not what opposition they have met with. Here the want of knowledge that they were opposed, makes it appear to us that they received a tacit assent.

We all feel, that if we were never to build upon what has

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impeachment by the commons in parliament. The American constitutions deprive the magistrate, who is invested with the pardoning privilege for common cases, of the same in several cases touching sentences in consequence of impeachments.

been established and decided, but were to begin in every single case entirely anew, progress in any sphere of action would be impossible.

We honor our parents and the aged, because the probability of greater experience is in favor of them — a manner of reasoning of especial force in those periods in which nearly the whole store of public experience is traditionally handed down, or has to be gathered by personal experience through a long life — in short, when books have not yet, in a considerable measure, supplanted, if not individual experience, for that they never can, yet knowledge of public matters, individually gathered.

We feel too that there is primâ facie evidence in favor of the expediency of the old law, for what has lasted so long should be supposed not to be inexpedient. Fortescue, in the seventeenth chapter of his work, De Laudibus Legg. Angl., has a long argument, that the English laws are the best because the oldest.[2]

As to the first, however, we must guard ourselves against a common error, namely, of extending the belief in that wisdom which we naturally ascribe to persons older and more experienced than ourselves, and especially to our parents and grandparents, in a progressively higher degree, to their parents and grandparents also, in short, to our forefathers; though their lives, and consequently their

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[2] See also Lord Coke's Prefaces to the Second and Sixth Reports, where he has adopted Fortescue's extravagant assertion, that the laws of England had remained unchanged from the times of British independence (before the Roman conquest), and attempts to sustain it by proofs. It is quite needless now to meet such vagaries by argument; but Mr. Amos has done it in one of his excellent notes to Fortescue (Clarke's Am. ed., pp. 52, 56), with some very judicious criticisms on the older writers. Of course, the incorrectness of Fortescue's facts does not affect the argument in support of which Dr. Lieber has referred to him. — Ed.

opportunity for gathering experience, may have been much shorter than ours has already been. This error is attributable to a confusion of ideas. One who is called old may be a living old man, who may have more experience than a young one; but the term may also apply to past generations which, if all the other circumstances are the same, cannot possibly have had an equally favorable opportunity for experience with ourselves. We are, indeed, as to experience, the old ones, and the past generations the young ones, provided all the opportunities are the same, or we do not throw away the experience of past ages by neglecting faithfully to study them; for in this case, it is very evident, we become again the "younger ones." Tacitus says already: "Nec statim deterius esse quod diversum est: vitio autem malignitatis humanæ vetera semper in laude, præsentia in fastidio esse." * Equally erroneous it is if unexperienced arrogance believes that every idea which has newly occurred to the individual is, on that account, new altogether and excellent: as if for it the great problem of each day were to nullify all history up to that day. I have dwelt on this important point of political ethics in the second volume of the work on that subject,[3] and only add here that the "wisdom of the forefathers" may be a sentence of sound sense, or an empty sound. It depends entirely upon the fact, what forefathers we mean, and whether they had a favorable opportunity to know much upon the point in discussion. It frequently happens, that

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* Dial. xviii. Also, Velleius ii. 92. See also Sir Thomas Browne, Vulgar Errors, Adherence unto Antiquity.

[3] See Political Ethics, Book III., ch. 7, vol. II., pp. 98–107 of second edition, edited by Dr. Woolsey. Phila., 1875. — ED.

a fundamental law of a country is adopted at a period when universal enthusiasm renders purity of action more common than is the case in easy times, when self-devotion is little called for and selfishness diffuses itself in all classes. Thus it was a great epoch when the American colonies declared themselves free, and there can be no doubt that there was more self-devotion in that congress at Philadelphia than in our easy times will be found in an equally large number of men. Those times were more exciting to virtue, and if we speak of the patriotic signers, there is truth in the expression "wisdom of our fathers." Not that they were better organized beings, for the favorite saying of Lord Nelson, that there are as good fish left in the sea as have come out of it, is very true, but the combination of circumstances was more favorable.

As to the second point, the antiquity of laws, it altogether depends upon the fact, whether they are good or not. Tonnage and Poundage, the ruin of Charles I., were first granted, for the life of the prince, to Henry V., as a recompense for recovering his right to France, but under a special proviso that it should not be held as a precedent in the case of future kings: "But yet," says Sir Edward Coke, "all the kings after him have had it for life, so forcible is once a precedent fixed in the crown, add what proviso you will.*

An old law, moreover, has left a beaten track, it has all the force of custom and habit, which form, in all spheres of human life, strong reasons to adhere to that which is already established. That which is new is disturbing and

* 2d Inst. p. 61. 4th Inst. p. 32.

distracting. These reasons, natural in themselves, operate sometimes most mischievously.

When Sir S. Romilly proposed to abolish the punishment of death for stealing a pocket handkerchief, the commons of England consulted Sir J. Sylvester, the recorder, and Mr. S. Knowles, the common-sergeant, as to the proposed improvement. They answered, "that such an alteration would endanger the whole criminal law." The common objection to any melioration, by those who disrelish it.

IV. Further reasons for the force of precedents or of that which exists already, are, that in politics and law, that species of assent which might be called lineal assent, in contradistinction to contemporaneous assent, has a different force from what it has in history. For the question in politics and law is about the continued action of a principle, and if such action has been assented to for generations, we must believe there is good ground for the principle and receive it as operating presently; unless we see sufficient and clear reason why we should set it aside; for instance, because times have changed, or assent was not free and voluntary. In history, it disposes us in favor of a statement, if it is proved that its truth was universally admitted at the time. I say it inclines us favorably, but it by no means affords sufficient proof: as history or even the affairs of common life frequently prove. Many high personages who died suddenly have been universally supposed, at the time, to have been poisoned. But the lineal assent is of itself of no value whatever in history. If a statement be originally made in such a way, that it excites our suspicion, or is deprived of the force of substantial proof, it becomes no more probable, by the most implicit belief of ever so

many centuries. If it can be proved, that some statement with regard to the foundation of Rome is highly improbable, or involves an impossibility, it matters not whether Livy believed it or not, or whether the middle ages believed Livy, or whether it has been repeated by many thousand authors relying upon Livy or those who subsequently believed him. The number of assenters is of some value with regard to contemporaries, but of none whatever in successive generations, unless the original statement has been subjected to continually renewed criticism. In this case, the degree of our assent is regulated by the keenness and sincerity of subsequent criticism, and not by the fact that many successive generations have, or have not, believed in the first statement. Another instance is the belief in *one* Homer. If it is proved that the poems heretofore ascribed to Homer cannot have been produced by one poet, but must be a collection of poems by various authors, all the belief of the many generations in one Homer has no weight.

But with a nation, with whom liberty has been a practical question for centuries, and with whom it has been long acknowledged that the stability of the law is one of the main ingredients of civil liberty — a nation, moreover, who did not receive the substance of civil liberty from some other country, but developed it gradually itself, as the English have done, the precedent must acquire a peculiar force. British civil liberty is so powerful a thing, because each important question has come before the commons as a practical case.[3] Law, it was acknowledged by all, should

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[4] The same principle has been of the greatest value in our private law, which recognizes no decision of a doubtful question until an actual case arises between

decide; but what was law? The people had nothing but the precedent to protect themselves against encroachment in the name of law, and though precedents worked fearfully, in many cases, for the crown, yet I believe no historian will hesitate to acknowledge that one of the most essential elements of Anglican liberty, is Precedent. The very fact that something — no matter what — beyond the reach of power was acknowledged as law between the power and the people, was a great principle, not to speak of the immense power which a citizen, struggling for a good cause, has when he can stand upon precedent opposite to power. The air of revolutionary innovation, of rebellious resistance, is wholly taken from his act, and the charge of revolution is thrown on the other party. The king and his servants, therefore, judged correctly when they resolved upon the arrest of Sir Robert Cotton, the antiquarian, because he furnished the leaders of the popular party with precedents.* They knew how irresistible a power was latent in those dusty papers; how mighty history is with a constitutional people which has worked for its liberty.

Precedents, like every other thing, may be sadly misapplied. The most absurd as well as the most criminal political acts, are propped with precedents. The corrected calendar of Pope Gregory XIII. was opposed, among other reasons, because to correct or change it was claimed as an imperial privilege, *because* Cæsar had first put it in order, and Constantine ordered the calculation of the feast of

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* Brodie, II. p. 155.

parties involving it. See quotation from Western Jurist, in note 9, *ante*, pp. 32, 33. The courts will not hear a fictitious case, even though brought on a real demand, with a secret object. Coxe *v.* Phillips, 6 Petersdorff, 160. — Ed.

Easter to be made at Nicæa; And the history or special law of cities and communities, shows that most of the strangest and exorbitant privileges claimed by individuals or communities over others, are founded upon nothing else but precedents, that is, mere facts. A feudal lord extorts from a community so many bushels of grain in one year, *therefore*, he has a right to demand it the next.[5]

It is very necessary, then, that we should ascertain what precedents have binding power, and how far they have it.

When Alexander had taken Gaza, after a gallant and protracted defence by Betis, he caused the body of the slain enemy to be dragged at the wheels of the royal chariot round the walls, adducing the precedent of his "progenitor," Achilles. The savageness of the act was not lessened by the Homeric precedent.

V. Before we proceed, however, it is necessary that we should make a clear distinction between legal and political precedents, the neglect of which has led, at times, to very erroneous and dangerous notions.

A precedent in law, or, as it is called, a legal precedent, is a decision arrived at after patient inquiry, into all points bearing upon the doubtful subject, by an impartial judge, who stands between or above the two parties, and is removed beyond the circle of interests within which the two litigating parties move. A legal precedent, therefore, is the settling of a doubtful point, by that very authority

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[5] The story is told that not long ago the reforming eye of the present czar of Russia found a useless sentinel in the midst of a lawn, and ordered inquiry to be made as to the reason of his being there. It was found that a century ago the empress had a fruit tree there, and set a soldier one day to guard the ripening fruit. Empress, fruit, tree, had all long ago disappeared, but the force of precedent had kept up the daily detail of a sentinel for the place.—ED.

which is created by society, among other things, for the settling of doubts between different parties. Society has no better way of making clear and stable that which was doubtful and unsettled. It is evident that, as long as there is no positive reason why we should deviate from it, we should adhere to such a legal decision. Nor is it in any way desirable that in all matters of legal doubt the highest legislative authority should be appealed to, as is the case in many European states. This leads to a continued and injurious intermeddling of the executive with the law, fetters the independence of the judiciary (one of the very elementary requisites for all liberty), and throws an impediment in the way of a free and wholesome development of the law, according to the spirit of the nation. Nor is it possible for high authorities to establish general rules which will apply so precisely, to the endless variety of combinations in law, as the authority of precedents is able to do, if rationally limited and not carried to an idolatry of the past or the established.

As the opposite to legal precedents, we may consider measures of the executive. They differ in their very character from the former. They are not the decision made between two parties by a third and impartial one; they are nothing but acts. They may be good or bad; they, like any other acts, cannot become better by repetition, if they are bad in the beginning.

Lastly, precedents may be of a somewhat mixed character; they may neither have judicial impartiality, nor, on the other hand, be mere acts. Many legislative acts are examples of this kind. Inasmuch as measures are debated, before being adopted by a legislative assembly, we may

compare its action to the balancing of the opposite interests in court; but inasmuch as the legislative assembly does not judge of an occurring case according to prescribed laws, but, on the contrary, is making these very laws, and inasmuch, also, as the different interests are represented in an assembly of this kind, by two different parties, indeed, but very frequently not impartially weighed by the same persons, their decisions partake of the character of measures and acts, such as we have mentioned already.[6]

VI. We have already seen, that no human wisdom can contrive to make laws which will precisely cover all complex cases that may occur, whatever attention may be paid by the law-makers to the variety of compound cases, which they are able to imagine; and that it is not in the power of any human intellect, though of the most comprehensive grasp, to draw up a political constitution, so as to leave untouched no case which can appear doubtful, considering the condition of society at the time of its being drawn up.* As to future generations, the problem becomes

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* The words of President Madison, quoted by President Harrison in his

[6] The force of the distinction here pointed out by the author between legislative and judicial action, is very plainly seen in those cases where a legislative body is called upon to pass bills which are in substance adjudications upon private rights, as is often the case with private acts of parliament. The English parliament, by which this power is very largely exercised, without restraint from any written constitution upon its power to affect or even take away private rights of property, etc., — but which has also displayed, perhaps for that very reason, a laudable anxiety to do exact justice to all persons interested in such cases, — has been obliged to frame and enforce a code of rules for its own action as minute and technical as those by which an ordinary court of justice is governed. Parties interested must be duly notified, proof made of the regularity of every step taken, the provisions of the bill subjected to the most rigid scrutiny, with opportunity for all sides to be heard, etc., etc. Full details of the practice in such cases will be found in Dwarris on Statutes, I. 350–497. It were much to be desired that some safeguards of the kind could be thrown around American legislation beside those furnished by our constitutions, which usually protect vested rights only by annulling the work of the legislature. — Ed.

still more impracticable ; because the state of human society is continually changing, and ought to change, according to its very principles of existence. This is a rule so well established that statesmen and lawyers are now agreed upon the wisdom of pointing out principles and drawing general outlines in a clear and easily understood language, in constitutions and laws, rather than giving minute details, which, in whatever degree we may augment the enumeration of minutiæ, have a tendency rather to contract than to extend.* It is far easier to act upon laws, in a manner corresponding to the intention of the legislator, when they are brief and clear, and rely upon common sense, than when the details embarrass every step, and prevent the application of the general principle, when the specific case has not been enumerated and singled out by the law-maker.

As it is, however, a well-known maxim in politics and jurisprudence, that the certainty of law is next in importance to its justice — and by certainty of law we understand

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Inaugural Address, March 4, 1841, ought not to be omitted here. The latter said: "I believe with Mr. Madison that repeated recognitions under varied circumstances, in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications in different modes of the concurrence of the general will of the nation, * * * as affording to the President sufficient authority for his considering such disputed points as settled."

* I found on the wall of a humble tailor's shop, in Warwickshire, these words in large letters: —

Tight will tear;
Wide will wear.

The sartorial wisdom made an impression upon me that, now when writing on constitutions of states and empires the six words on that wall recur to my mind.

both that it be well defined, known and unwavering, as also that its penalties fall with unerring certainty upon those who deserve them — it becomes necessary that doubtful points, springing up from a new state of things, should, if once settled, be considered so, until a weighty reason induces us to deviate from the settled decision.

VII. If the precedent is deprived of that weight which according to the foregoing pages ought to be allowed to it, civil liberty, which depends in so high a degree upon a universally diffused knowledge of rights and obligations, as well as upon the stability of government (for instability of government engenders civil immorality), becomes impossible. A citizen, conscientiously desirous of doing right, can obtain no advice from the counsel, whose profession consists in the knowledge of the laws, in any complicated case, if the lawyer himself does not know a certain general rule, or law, which may be applied to the compound case under consideration. Hence, too, we find that the citizens of those countries, in which public liberty has been highly prized, require their rulers to swear, before they assume the highest power, that they will govern according to law and custom; and custom is but precedent. Some of the gravest charges against impeached ministers, or of revolted subjects against their monarchs, have been, that the accused individuals had disregarded the customs of the land.

Without due regard for precedents, no development and expansion of any fundamental law, that is, no expanded application of the principles it contains, commensurate with the expansion of society and the change and progress of all relations, can possibly take place. If nothing becomes

settled, disorder must be the consequence. Words may mean very indefinite things; it is by practice only, that they acquire definite significations. Is not this the case between friends, or men brought together in any collegiate relation? It is still more the case, in the great political intercourse of citizens.

"The King willeth that right be done, according to the laws and customs of the realme," &c. The King's Answer to the Petition of Rights, Rushworth, T. 1, p. 590. The king of Great Britain swears, at his coronation, to govern "according to the statutes in parliament agreed on, and the laws and customs of the same."

VIII. In a free country, then, where a knowledge of the citizen's rights is all important, a precedent in law, if correctly and clearly stated — this is an essential requisite — and if applied with discernment, and with the final object of all law before our eyes, ought to have its full weight. If there has been a series of uniform decisions on the same point, they ought to have the force of law, because in this case they have become conclusive evidence of the law. (See Dupin's *Jurisprudence des Arrêts.*)* [7]

In politics, we ought to follow precedents, which touch

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* The reader will find this subject treated much more at large in my Civil Liberty. As a matter of historical interest, it may be mentioned that Lord Campbell says, p. 471, vol. II., Lives of the Chancellors, that decisions in Chancery were not considered as precedents, under James. Equity was not yet considered as a system of jurisprudence. [See Civil Liberty, third edition, by Dr. Woolsey. Phila., 1875, pp. 208–214 and 276, 277. — Ed.

[7] Forms the concluding part of that author's Manuel des Etudiants en Droit (pp. 377–539, of ed. Bruxelles, 1825). Those who suppose that the use of reports of decisions is peculiar to English and American law, and was formerly, if not at

upon matters of law, or which partake decidedly of the character of legal decisions upon previously doubtful points, as long as we have no decided and obvious reasons why we should deviate. As, however, most important questions in politics touch upon those broad and original principles upon which the protection of the citizen and the security of the state mainly depend, it will be found that precedents in this sphere will have far less authority than in law. It is the essential duty of a lawgiver and statesman to act, always, on distinct political principles and reasons, and to recur to them in every single case. A deviation from these principles involves a world of injury.

It seems that an imperfection of law, loses, in numerous cases, much of its evil character, merely by the fact of its being universally known; as a piece of rock, which has fallen into a road, is certainly an inconvenience, but if all the people who are in the habit of travelling that road know that this obstruction is in their way, they will avoid it, and a travelled road will form itself around it. Its inconvenience is greatly lessened by its being stationary and known; if, however, that piece of rock were frequently moved to different places, the injury to every traveller would be in proportion to his ignorance of its locality. Blasting the rock into atoms would be the best course; but, perhaps, it cannot be conveniently done, without injury to the interests of others, or, at any rate, those who travel the road, may not have the means or the right of doing it.

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present, unknown to the civilians, should read this admirable little treatise, and also the preface (*proloquium*) of J. H. Böhmer to his (10th) edition of the Decisions of Mevius (Frankfort, 1791, 2 vols., 8vo.). See also Additional Note N *post*. — Ed.

This applies to law; in politics proper, as we have said already, fundamental principles, and a constant recurrence to them, are far more important, on account of the greater importance of these principles as being themselves the origin and object of the law.

Whenever we are doubtful, and there are many such cases in law, we should adhere to precedents, because they carry along with them the additional reason of certainty. The statesman, however, must take into consideration the effects which his measures will have; his decisions will be generally characterized by their effects; and the greater part of the decisions, at which he will arrive, are new rules themselves, and not decisions according to given rules.

IX. Executive acts ought never to be considered as precedents by any one but the inferior executive officer, and he, too, must be conscientiously convinced, that the first act was not against the law. If we were to take every executive act as a precedent and a justification of similar subsequent ones, it would be monstrous and subversive of the very principles of a free government. The legal precedent is a decision between parties, but, in this case, the executive itself forms a party. The only plea which might be insisted upon with an appearance of plausibility, would be, that a general acquiescence in a measure, changes it into a precedent. But this is the more dangerous and fallacious, as the act in question is frequently of a kind, that either it cannot be well ascertained, whether general acquiescence has taken place, or that the demonstration of the contrary is impossible. A theory of this dangerous sort would be founded, moreover,

upon a principle contrary to free government on another ground. It is one of the fundamental principles of a free government, that a citizen has not only the right of dissenting from those in power, but also publicly to pronounce that dissent, and to unite with others, in order to dislodge by combined strength, using fair and honest means, those who, for the time, are invested with the insignia of authority. What sense would the words minority and majority have otherwise? It is a most sacred right of every freeman who belongs to the minority to convince his fellow citizens, if he can, of the justice of his cause, and gradually to make the minority, to which he belongs, the majority. What, moreover, can the majority do, but to follow the footsteps of the preceding one, if political precedents shall have the authority of legal ones, or binding power in any wise approaching to them? The judge ought not to decide upon his own principles, nor upon any principles other than those of the established law; the politician stands upon an entirely different ground. It is, actually, upon a difference of principles, that a different administration comes into power.

If the legal rules of precedent were to be applied to the acts of the executive, or of any authority which exercises power (for this seems to be the criterion), then any successful transgression of power would at once establish the right of transgressing it for ever. Is there a free country on earth whose history does not mention repeated instances, when those invested with power or prerogatives have disregarded some of the rights and franchises of the people, considered by them as vitally important to their liberty and well-being? There is hardly a tyrant never so

vile, who will not, nor, indeed, who cannot, cite precedents for his most atrocious offences.

Horne Tooke said in his "Petition of an Englishman:* "You have a precedent in Cade. And for the justification of any infamous and dirty business, it is at *present* sufficient that there is a precedent;" and Dr. Thomas Arnold † has these words, too unlimited, it is admitted, when thus separately given: "Nothing has ever been more pernicious to the growth of human virtue and happiness than the habit of looking backwards rather than forwards for our model of excellence." ‡

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* Printed in 1765 (25 pp. 4to). I quote from Memoirs of John Horne Tooke, London, 1813, vol. I., page 64.

† Page 7 of his Miscell. Works, London, 1845.

‡ Has the Jacobinical tendency of throwing history overboard produced no evils, at least as pernicious? I have touched upon these two extremes in my Introductory Discourse on the State (New York, 1860), which can be in the hands of but few of my readers, in the following words: —

"The faithful teacher of politics ought to be a manly and profound observer and construer. His business does not lie with fantastic theories or empty velleities, except to note them historically, and thus to make them instructive. Aristotle says, and Bacon quotes his saying approvingly, that the nature of a thing is best known by the study of its details, and Campanella, whom I quote only to remind you how early the truth was acknowledged, observes that a thing consists in its history (its development), not in its momentary appearance, its phenomenon. Let us keep these two dicta before our eyes during our inquiries into the state, with this addition, that the knowledge of details yields fruitful acquisition only if it be gathered up in an ultimate knowledge of the pervading organism; and that, however true the position of Campanella, we must remember that politics is a moral science, and history, the record of political society, has not necessarily a prescribing character. Where this is forgotten, men fall into the error of Symmachus pleading for Victoria, because the goddess of the forefathers, against the God of the Christians, because a new God; but where men forget the importance

X. As precedents in law are formed out of that same law, or are so professedly, we have a standard, indicated by themselves, according to which we may judge whether they have indeed that authority which only legal precedent can have; but in politics, to take precedents from the history of other nations, becomes delusive and dangerous in the same degree as that history is less known to us, in all the many details which may have had a bearing upon the precedent. A rule, that never ought to be departed from, is, that wherever power is suspected to have been unduly exercised, let the case be decided on its own merits; because, as we have seen in a previous chapter, it is the natural, inherent and necessary attribute of all power, physical or moral, that it tends to increase. Moral power is not necessarily evil disposed on this account, but without this tendency it cannot be power. If, then, political precedents should always be entitled to respect, they would only increase and propel, and, therefore, extend, instead of regulating, the motion and effect of power.

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of history, development becomes impossible, and dwarfish schemes will set men in restless motion, like the insects of corruption busy in disintegrating mischief." [8]

[8] But when Dr. Arnold used the language quoted above, it is not probable that he meant in any way to disparage the study of history. He was himself too devoted a student of that science, too much impressed with the value of historical precedents and lessons, as all his life and writings prove, to underrate them even in a passing remark. What he undoubtedly had in mind when he spoke of "the habit of looking backwards rather than forwards for our model of excellence," was the theory, so prevalent in the last century, as well as in earlier ones, of a state of nature in which the ideal perfection of law, morals, — in short, of human nature, — had actually existed, before crimes, injuries, and other marks of human imperfection had appeared to pervert it. We sometimes hear, even yet, the natural or perfect condition of society — or oftener, of some particular institution or relation — so referred to an indefinite time in the past. Dr. Arnold had studied history too well and thoroughly to take this view He knew that we must look forwards rather than backwards to find all human institutions in their natural condition, if by natural we mean that in which every part of their nature is most fully and harmoniously developed, so as to serve for a model of excellence. — Ed.

"And that your Majestie would also vouchsafe to declare, that the awardes, doeings, and proceedings, to the prejudice of your People, in any of the premisses, shall not be drawn hereafter into consequence or example." Petition of rights (drawn up by Lord Coke, then Sir Edward[9]) presented to Charles I. June 2, 1628.

XI. For the same reason, precedents, in regard to questions of doubted jurisdiction, assumed and decided upon by the same court, whose power is doubted, are of less value than those which occur in the decision of ordinary law cases. The court here forms a party, and the *stare decisis* does not apply with equal force, as in a proper law decision on a question of meum and tuum.

The force of precedents, in law, rests partly on this, that similar cases have been decided in some one way or the other, by men living at a different time or at different places, and when the points in question were argued by different counsel. In this, too, legal precedents differ materially from mandates of the executive construed into precedents.

It may be adopted as a sound maxim, I believe, that the more the advocates of a political measure feel themselves obliged to rely on precedents, the less they ought to be trusted, and on no account ought precedents alone to decide any thing in politics, if doubts exist at all.

XII. Perhaps no case shows more clearly, the danger of taking executive measures for precedent, than the history of the Star-Chamber. I copy the following from Brodie: —

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[9] Coke was "Sir Edward" till his death. He was a member of the last house of commons that sat in his lifetime, though not present at the last session in 1629. His title of "Lord" Coke was by courtesy only, as chief justice. The first common-law judge made a peer was Sir Edward Jeffreys, in 1685. — Ed.

"When this pernicious court was first established by Wolsey, it proceeded with great caution. *The president of the king's council* was added by stat. 21 Henry VIII. c. 20, to the number of judges — a clear proof that, even at this late period, it was conceived to be quite distinct from the council — and by certain acts of parliament, both in that reign, and even in Elizabeth's, some particular kinds of cases were committed to its jurisdiction. But it, in no long time, assumed a bolder tone, till it even disowned its origin. The whole privy council arrogated the right of sitting there in judgment, and the question was no longer what the statutes allowed, but what the council in former times had done. Having once adopted the principle of precedent, it no longer submitted to any check upon its proceedings. Every act of the council in the worst times, was raked up, though so many statutes were devised against such proceedings; cases were grossly misrepresented; strained analogies were resorted to; and where no shadow of a precedent could be discovered, ingenuity could invent — a proceeding the more simple, as no regular record was kept; while every abominable recent case was held to be conclusive in all future ones. Where no precedent could be discovered or invented, then the paramount, uncontrollable power of a court, in which the monarch might preside in person as sole judge (for having held it to be the same as the council, they next assumed that principle), was entitled to provide a remedy for any alleged disorder. The judges of this court, too, neglected no means for advancing so abitrary an institution. Under the pretext of desiring to be directed by the best legal advice, they usurped the power of nominating the counsel who should plead before them; a practice that operated to the exclusion of every

man who had honesty and independence enough to assert the rights of his client. The great Plowden fell under their severe animadversion, for reminding them of stat. 3 Henry VIII., and Sergeant Richardson, about thirty years afterwards, incurred a censure for a demurrer to the same effect. The consequences may, therefore, be easily figured: every precedent begat a worse; and, towards the close of Elizabeth's reign, though the Star-Chamber still retained some decency, it had reached a monstrous height; but under the Stuarts, it threatened a general overthrow of popular rights, and the engrossment of all ordinary jurisdiction." Brodie, vol. I. p. 188.* [10]

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* On the other hand it is perhaps fair to quote from Macaulay's History: "No other society (than the English) has yet succeeded in uniting revolution with prescription, progress with stability, the energy of youth with the majesty of immemorial antiquity."

[10] The king's council early exercised criminal jurisdiction. As the legal polity of the state became settled, and clearer ideas of justice prevailed, the power of the council in criminal, as well as in other matters, was restricted by statute. From the time of Edward III. to Henry VIII., the jealousy of parliament was manifested by a sturdy policy of repression, until, in the time of the latter prince, the prerogative-judicature of the king in council, as compared with its original power, was very small, and seldom exercised.

The statute 3 Hen. VII., c. 1, revised and remodelled the tribunal, and gave it new vigor and impulse. Lord Bacon elaborately defends it, and says its action was directed principally against "force." Probably it had its origin in the desire to speedily and finally extirpate the spirit of disorder which the civil wars had rendered so rife. The preamble states that "the king, remembering how, by unlawful maintenance, giving of liveries, signs, and tokens, * * * by taking of money by juries, by great riots, and unlawful assemblies, the policy and good rule of this realm is almost subdued, and for the punishing of inconveniences * * * little or nothing may be found by inquiry (*i.e.*, by inquest by juries), whereby the laws of the land may take little effect, to the increase of murders, robberies, perjuries, and uncertainties of all men living, for the reformation of which" it was ordained that all offenders should be summoned before the chancellor, treasurer, privy seal, a bishop, a lord temporal of the council, and the two chief justices, as judges, who should examine and punish, "after the form and effect of the statutes, in like manner as they should and ought to be punished if they were thereof convict after the due order of law."

The effect of this statute, as avowed and explained by Lord Coke (Inst. IV., c. 5), was to enlarge the judicial authority of the council. It was expressed in the affirmative, and hence not prohibitory of the former jurisdiction and process. The body existed, then, in both capacities, — as the old council and a new court; the process,

"No man shall take advantage of his own wrong," is a principle nowhere of greater importance, than in government precedents.

XIII. Whether we attribute authority to precedents or not, we ought always to pay proper attention to them; for whatever subject may occupy our reflection, it will always be found of great assistance, to inquire how others, in different situations, have viewed and acted upon the matter. New ideas will be suggested, and the subject will appear in different connexions. Mr. Gerard Hamilton (Single Speech Hamilton) gives it as an important rule, in his Parliamentary Tactics, which will be allowed on all hands to be a work of exceeding shrewdness, whatever we may think of its principles, that whenever a subject previously acted upon is before the house, we ought to read some works or pamphlets, written at the time when it previously occupied

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mode of trial, and judges were changed, but the crime and punishment remained. In fact, during the reigns of Henrys VII. and VIII. it appropriated to itself all the judicial authority of the ancient tribunal. During the reign of Elizabeth it extended its control to libel, sedition, and all offences of a political character; from time to time, as its needs of jurisdiction were included in statutes, it stretched far beyond the words of the original statute, until it grasped all cases which the tribunal itself imagined to concern the state. The proceeding was by interrogatory, — a method unknown to the common law, — and the discretionary power of punishment was practically unlimited, though it did not, in words, extend to any offence that "concerns the life of man." In fine, by the operation of this statute, and one slightly amendatory, 21 Hen. VIII., c. 20, the offences named, and subsequently many others which had been cognizable by indictment and action, might be arraigned and tried without an inquest, without a jury, upon a simple examination of the parties and the witnesses.

The prompt and efficient action of such a court was doubtless adapted to times of trouble and disorder. But, in a more peaceful state of society, its practically unlimited power became quite as efficient a means of oppression. Dependent upon the sovereign, it was active and vigilant in his behalf. By intimidation of juries, under the charge of perjury, it brought the criminal law to its feet; for, when it took into consideration the verdict of the juror, it really reopened and retried the cause, — it exercised an unlimited criminal jurisdiction, without chance of appeal.

Such a tribunal could not exist among a free people. "If the Constitution had not overthrown it, it must have worked the downfall of the Constitution." In the reign of Charles I., when political liberty was boldly struggling to vindicate its just claims, the Star-Chamber was finally abolished. — ED.

the attention of politicians. Whether we ought first to reflect minutely upon the subject, and then consider precedents, or *vice versa*, must depend upon the conviction we have of our own independence of thought upon the subject. If we know that we are master of the subject, and that our views, upon those principles which we acknowledge as the fundamental ones of our whole political course, are clear, then we ought first to view the matter in the light of our own resources alone.

The interests of the moment, the magnitude, with which subjects, in the very midst of which we live, appear, are apt to represent them in too glaring a light, to the injury of other more distant interests. Montesquieu probably meant this, when he said: "It is with a trembling hand that we ought to change laws." This is another reason for attention to precedent.

XIV. A precedent ought to be sound, that is, it ought to come from good authority, or a period which we consider favorable to a thorough and sound view of the subject in question. Even James I. said, "precedents in times of minors, of tyrants, of women (which was a very unfortunate slip for a James, who followed an Elizabeth), simple kings, are not to be credited, because for private ends."*

Precedents must be taken with all their adjuncts, or they will be totally misunderstood; and not only with their adjuncts at the time, but likewise with their consequences and effects.

No precedent of whatever sort, can weigh against right

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* Brodie, I. 346.

and distinct law, for the latter are certainty, and precedents are used to obtain approximate certainty in cases of doubt.

Precedents must not increase power against those who are to be protected; for the latter, frequently, cannot oppose the first step of arrogation.

Precedents against law or the law's reason must be set aside. Lord Coke says: "Quæ contra rationem juris introducta sunt, non debent trahi in consequentiam."* [11]

If the subject which they relate to, has changed, or if we are convinced after patient inquiry, which includes a thorough knowledge of the subject-matter, that we ought in justice to deviate from former decisions, we act wrong in perpetuating that which is unjust or injurious; for whatever may be said, reason is and must remain above law and precedent. A frivolous or hasty application of this principle is highly dangerous; yet it does not become on this account, the less true. If we should consider all future cases of a similar nature, as prejudged by our decision, stagnation would be the consequence, instead of an expansion and development of the law. There is such a thing as idolatry of precedents, and an idolatry it is,

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* The case of Proclamations, Mich. 8 James I., A. D. 1610. 12 Coke's Reports, 74.

[11] Coke was indebted for this, as for so many other of his maxims, to the civil law. Whether he drew from the classic sources of that law directly, may be doubted. He could find many of them in Bracton, and the early other writers upon English law. But there are passages in his works that show he was not so entirely unacquainted, as it has of late been common to suppose, with the system of law which prevailed in his time over all the states with which England was in the fullest communication. The changes of phraseology with which the Roman maxims appear in his writings are good grounds for supposing that he got them at second-hand. Thus, the maxim quoted in the text reads in the original of Paulus: "Quod contra rationem juris receptum est, non est producendum ad consequentias." Lib. 141, pr. D. de R. J., 50, 17. Upon the meaning of the maxim, see Supplementary Note G, on Ratio Juris. — ED.

which, at times, has slaughtered Justice at her own altars.

One of the reasons why due weight should be given to precedents, is, as we have seen, the safety and security of the citizens, the steadiness of the knowledge of the law. Adherence to precedents, however, may be carried to such an extent, that its effect is to the contrary. If while only known and acknowledged precedents are followed, that which, according to common sense and justice, ought to be done, is also omitted for fear that some hidden precedent to the contrary might exist, then precedents unsettle instead of settling. An effect not unsimilar takes place when something which ought to be done is omitted, merely because no precedent is known. Surely the first act can have no precedent; and a precedent unknown in practice, and merely hunted up in the archives, has lost the very character of an authoritative precedent.

If the London *Evening Mail* of April 18, 1834, reports correctly, Mr. Justice Taunton said, in the case of the king on the prosecution of William Seymour, Esq., *v.* Holloway, "that, however hard the case might be (another justice had already declared the case exceeding hard), he did not remember any precedent, which could authorize the interference of the court. The clerk of the court, however, would search among the crown records for a precedent, if such existed, and would inform the learned counsel of it; if there was such a precedent, the learned counsel could bring the matter before the court."

A precedent in itself, merely as a thing that has happened, or been done, can have no power one way or the other; and the rule, that that which is wrong in the

beginning cannot become right in the course of time, is surely too deeply engraven in every man's mind to be doubted. Many of the most eminent lawyers, and we would say, all the most philosophical among them, such as Lord Mansfield, have acted upon this principle and overruled wrong precedents, though with great caution.*

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* See the sound and clear exposition of the delicate subject of legal precedents in 1 Kent's Comment. Lect. XXI. p. 479 and seq.

The Roman Law acknowledges the authority of precedents in a far less degree than the English; in fact, if we take the word "precedent" in the English sense, the former does not acknowledge precedents at all, but makes habitual recourse to the emperor, in his legislative capacity, necessary. Those nations, which have adopted the civil law as the main foundation of their own, act upon similar principles. With them, the necessity of judiciary independence upon the executive, is not so clearly acknowledged, as with the Anglican race. It has been shown already that this independence requires, in a considerable degree, the acknowledgment of precedental authority.

The Code, Book I. Tit. 16, 22, declares: "Si imperialis majestas causam cognitionaliter examinaverit, et partibus cominus constitutis sententiam dixerit: omnes omnino judices qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causæ, pro qua producta est, sed et omnibus similibus."

I am not acquainted with a more striking illustration of the weakness of the mere precedent as such, that is, founding the precedent exclusively on the mere fact of its having happened, than the following case, which therefore is given somewhat at length. The lord chancellor of England, in February, 1841, gave judgment in a case in which two nephews and one of the nieces of Admiral Pym claimed legacies of £5,000 and of £6,000, given by the will, in addition to sums of £3,000 and of £4,000, given them on their marriage. His lordship was of opinion that the legacies were redeemed by the portions, the Admiral having placed himself *in loco parentis*, and it was decreed accordingly. On Saturday, the 23d ult., a question was raised and argued as to the extent of the ademption, Mr. Bethel and Mr. Lowndes contending, on the part of the nephews, that the legacy was only satisfied to the extent of the £3,000 received, and that the

Thus, the monstrous patent granted by Edward IV. to his father-in-law, Earl Rivers, in the 7th of his reign, giving the vastest powers to the High Constable and Marshal, is explainable only on the ground of the then convulsed state of the country, and its being necessarily under a sort of military government. Sir Edward Coke, therefore, pronounced it "a most irregular precedent," and says that "therefore by no means the same, or the like, is to be drawn into example." 4 Inst. p. 127. And Lord Bacon,

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estate of Admiral Pym was liable for the other £2,000. They admitted that it had hitherto been supposed to be the rule of law, that an ademption in such cases satisfied the whole of the legacy, but they showed from the registrar's books that the two cases on which the supposition rested were misreported, and that they relied on the general principles of equity for a decision, which would set the law at rest, and correct a gross injustice. The lord chancellor now gave judgment, and observed that he was much struck with the consequences of his decision in the present case, as well as in others, as by that decision, according to the supposed rule of law, a portion given by a person placing himself *in loco parentis*, satisfied a legacy, however great might be the difference between the sum given and the sum bequeathed. His lordship had since heard with pleasure, in the course of the argument on the subject, that the alleged rule of law was not warranted by reason or authority. The two cases on which the rule mainly rested had been found, by an examination of the registrar's book, to be misreported, and as what Lord Eldon ruled in *Ex parte* Pye seemed to have been founded on them, it ceased to be an authority. The public and the profession were greatly indebted to the gentlemen whose industry had brought to light the true facts connected with the cases on which the supposed rule of law was founded. Under this new state of facts his lordship held that, not only on the reasonableness of the thing, but on the true principle of equity, and the authority of the cases said to uphold a contrary doctrine, the nephews and niece of Admiral Pym were entitled to the difference between the portion and the amount given by the will, and his lordship decreed accordingly. [Pym *v.* Lockyer, 5 Mylne & Craig, 29, by Cottenham, C. — Ed.

no friend of Coke's, praises Lord Coke's Reports as containing "infinite good decisions and rulings over of cases." *

* When Cardinal Mazarin was outlawed by the Parisian parliament, the records were searched in order to discover what price ought to be set on the head of an enemy to the kingdom. It was found that in the reign of Charles IX. the sum of 50,000 crowns had been voted by the parliament to whomever should produce Admiral Coligni alive or dead. The same recompense was now proffered, in order to act in accordance with precedent.

CHAPTER VIII.

Authorities — Akin to Precedents — Definition — Ought we to submit to them? — Slavish Submission to them — Arrant Disregard of them — We must always adopt Authorities in many Branches — Main Questions of Historic Criticism — Similar ones regarding Authorities — Who is he? — What Opportunity had he to know the Subject? — What Motive prompted him? — What internal Evidence is there? — Various Phases of the same Authority — Classical Periods — Of what Extent is the Authority?

I. The last subject, connected with hermeneutics, which we shall consider, are authorities. Of course, we have not to consider here those authorities which by law we are bound to follow, but only those which we feel morally obliged to acknowledge to a greater or less degree.[1] Many remarks which were made in regard to precedents apply with equal force to authorities, as most of the observations which will be made on the present subject hold good in regard to the former, as is necessary from their nature.

II. By authority we understand, in the limited sense in which it is taken here, an individual whose opinion, for some good reason, is of great weight, which, therefore, we use to support our argument, or adopt, in doubtful cases, as a rule of action, or we follow in cases in which we have not the proper means to inquire into the whole truth, or arrive at a satisfactory decision by an independent act of judgment.

[1] See Note 1 to previous chapter.

III. The first question here, which we must address to ourselves, is: ought we to submit to authorities at all? Has not every one received an intellect, with reasoning powers to judge for himself? Is it not enslaving the mind to submit it to the opinion of another? These are questions which I do not invent, while writing these lines, but which have been started from time to time, and are at this moment repeatedly asked, and frequently answered in a very unsatisfactory manner, as I conceive it. There is such a thing as Chinese submission to ancient authority without criticism and reason, and there is such a thing as arrant sans-culottism, disregarding all authority and leading to licentiousness, in morals and religion, not less than in science, law and politics. It is the object of these lines to aid, if possible, in obtaining a clearer view of this subject; one which touches the dearest interests of society and the welfare of the individual, and in establishing some rules which may guide us.

IV. "Implicit faith belongs to fools," is the title of the first chapter, section three, of Algernon Sidney's Discourses concerning Government, and it might be added: blind obedience belongs to rogues and not to honest men. We must have reasons, why we ought to believe or obey, why we ought to adopt the opinions of others, why we ought to yield to their judgment.

The reason why we sometimes ought to yield to the judgment of others is simply this, that each individual cannot be experienced and thoroughly versed in all things, nor has each one possessed the same opportunity to observe, or received the same faculties and endowments for observing

all things. If my watch is out of order, my house out of repair, my body out of health, I yield to the opinion of that watchmaker, carpenter or physician, whom for some good reason I consider competent to decide in the respective cases. If I write a book on human society, and am desirous to know first of all the physical difference between man and other animals, or ascertain the difference between ancient and modern finances, I inquire what naturalists like Cuvier have said on the former, or scholars like Boeckh on the economy of Athens. If I desire to obtain a thorough view of oratory, I see what Cicero has said, or what Demosthenes or Fox, Grattan or Pitt, have done in this sphere ; the first, because I know that he had a good opportunity to observe and inquire, the latter, because I know they have effected much by their speeches. If a house of legislature is obliged to determine on a subject on which no member has a thorough knowledge, witnesses are examined at the bar or before committees, or the whole subject is first inquired into by a committee, to the report of which the legislature grants that degree of assent which the peculiar circumstances of the whole case may warrant. A Shakspeare is good authority in many matters of poetry, though not in all. We see, then, clearly two things: we are daily and hourly obliged to acknowledge authorities, but we must have good reasons not only for our acknowledgment, but also for the degree of our assent. No more is demanded, in matters of law and politics, than what every one in his individual life, experiences daily. We omit a most important duty, if we neglect collecting experience in our life, by impressing the result of important, perhaps dearly paid for, transactions or events distinctly upon our mind,

so that we regulate our actions by it, even at periods, when the details of the events have vanished from our memory, and we only remember the fact that, at the time, we made up our mind after ample experience, and the result at which we arrived. This applies to cases of expediency, as well as to strictly moral cases. Far greater is the duty of societies in the aggregate, of communities and states to store up experience, for, it cannot be too often repeated, politics are not matter of invention, but of experience; not an abstract science, but the application of the eternal principles of justice and truth to ever varying circumstances.

V. If we are desirous of ascertaining what degree of belief we ought to grant to a historical account, we ought to ask ourselves before all, the following questions respecting the author and the account itself.

Who is he? We ought to know, if possible, where he lived, how he lived, what his connexions, his mental capacity, his morality, his temper, whether rash or cautious, or over-cautious, a matter of fact man, or of ardor and impulse, whether he or his family have suffered, &c.

What opportunity had he to observe? Did he see things, or receive them from the first source, or at second hand, or by distant hearsay? Was he engaged in the transactions which he relates; did he take pains to learn the truth?

What motive had he to give this account? Does he endeavor to defend a party, a certain transaction or individual? Could he gain by it, or did he expose himself by giving it? Is he in any manner interested in the matter? Were the times he lived in so agitated by a

certain principle, that even unconsciously to himself this gave a strong bias to his mind, one way or the other, even in viewing events long passed by?

What internal evidence of truth do we find in the account, and how far do those statements which we have it in our power to compare with authenticated statements, agree? We possess, not unfrequently, accounts of much importance, the author of which is even unknown to us, and yet they bear such evidence of truth within them, that we cannot do otherwise, but grant a high degree of faith to them. Instances are found in Raumer's late work containing the correspondence of ambassadors and other persons in high stations, discovered by him in various European archives.

VI. Now, these rules of fair criticism, modified according to the different subjects, are applicable, likewise, to authorities in politics and law. If an authority is cited to which we are expected to grant assent or respect, we ought to ask ourselves first of all, —

Who is he?

What opportunity had he to know the subject? In what time did he live?

What motive prompted him?

What internal evidence has the authority? and

Of what extent is the authority?

VII. *Who is he?* It is evident, that the whole character of him who is claimed as having established the authority, is of the greatest importance — his moral, mental and political character. That which is applicable to individuals, is no less so as to whole bodies and periods. We must be sure that their character be sound.

Mr. Greenleaf, in an interesting paper,* says: "Neither are all reporters entitled to equal consideration; but in weighing the credit which they deserve, regard must be had to their opportunities for observation of what passed in the court, their ability to discern, and their habitual care and exactness in relating. We may listen, with almost implicit deference, to Plowden, and Coke, and Foster; while the authority of some others is entitled to little more respect than was shown to the honest, but blundering Barnardiston, whose contemporaries, 'who knew the sergeant and his manner of taking notes,' were surprised rather that he ever stumbled on what was right, than that he reported so many cases wrong. The manner of the decision, too, and the reasons on which it is professedly founded, and even the decision itself, may receive some coloring and impress, from the position of the judges, their political principles, their habits of life, their physical temperament, their intellectual, moral and religious character. Not that the decision will depend on these; but only that they are considerations not to be wholly disregarded in perusing and weighing the judgment delivered. Thus we should hardly expect to find any gratuitous presumption in favor of innocence, or any leanings *in mitiori censu*, in the bloodthirsty and infamous Jeffreys; nor could we, while reading and considering their legal opinions, forget either the low breeding and meanness of Saunders, the ardent temperament of Buller, the dissolute habits, ferocity and profaneness of Thurlow; or the intellectual greatness and

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* Professor of Law in Cambridge University, Massachusetts, Introductory Lecture, &c., in the Law Reporter, Boston, Mass., December, 1838.

integrity of Hobart, the sublimated piety and enlightened conscience of Hale, the originality and genius of Holt, the elegant manners and varied learning of Mansfield, or the conservative principles, the lofty tone of morals, and vast comprehension of Marshall.

"Neither should we expect a decision leaning in favor of the liberty of the subject, from the Star-Chamber; nor against the king's prerogative, among the judges in the reigns of the Tudors, or of James the First; nor should we, on this side of the water, resort to the decisions in Westminster Hall, to learn the true extent of the admiralty jurisdiction, which the English common law courts have been always disposed to curtail, and in many points to deny; while it is so clearly expounded in the masterly judgments of Lord Stowell, and of his no less distinguished and yet living American contemporary."

VIII. *What opportunity had he to know the subject? In what time did he live?* In cases of law, for instance, it is of great importance to know whether the case was amply and thoroughly argued, and whether the opinion, now claimed as authority, was given after full investigation, and a detailed examination, or, perhaps, incidentally.

In important political matters, it is necessary to know whether the authority belongs to what we will call a classical age, by which I mean, that period, which by the concurrence of many rare and favorable circumstances, rendered those who lived in it peculiarly fit to see the whole bearing of a question, and which in its result, shows that these questions were thoroughly understood, perhaps sealed with the sacrifice of the dearest interests, even life — periods

which, for these reasons, carry a power of victory within them for all successive ages.

A thousand political and religious circumstances, conditions of life and peculiarities of character, coöperated to develop the most exquisite taste in the Grecian tribes. Their sculpture, their architecture, has remained unrivalled, and we are not only permitted, but bound to admit them as good authorities in these branches, if we believe at all in progressive civilization, and that history assigns the development of certain problems to various nations, so that their activity is directed to that point, and that they produce some grand effects which may benefit other nations, without their being obliged to go through the same trials, to make the same sacrifices.

We find the same in politics. The very spirit of liberty demands, in all common cases, compromise; a law shall be so poised that it injures the least and benefits the most. The claims of all shall be proportionately honored. An absolute government need not weigh matters respecting existing rights with the same nicety; it disregards them if it has vast plans in view, which ultimately result, or are believed to do so, in a general benefit. If this circumstance is seized upon by enlightened absolute governments, great plans may be carried with comparative ease. Masses may be obliged to yield and work toward the vast object. We have an instance in the Prussian general school system. This being the case, other nations would neglect their duty not to adopt, from this system, those beneficial results which are applicable to their peculiar cases, and offered, without the necessity of adopting the same original means to arrive at them. Polytheism, representing the gods in

human shape, which thus came to be idealized, greatly aided in raising the plastic arts in Greece to that eminent pitch of excellence in which we behold [them] when walking through the Vatićan. Let us, at present, reap the fruits, without passing through the same religious mazes. Absolutism aided greatly in effecting that general plan of education, which we behold in its vast results, in Prussia: let us take its best fruits, without going through the same political process. France has done so.

No one can study the Constitution of the United States, without perceiving how powerful an influence the principles of the Petition of Right and the Bill of Rights — which, with the Magna Charta, form the bible of the English Constitution, as Chatham said — exercised, in producing that memorable instrument. It was right that the framers paid this regard to those great acts, for the age which produced them must be considered, as to some points of constitutional development, classical.

Hampden brought one of the most momentous points in all constitutional history to an issue, and wagered his property and his all for thirty shillings six pence, and his trial for the ship-money must be considered as a more important chapter in British history, than those made by some whole reigns. Let us take him as good authority, showing how important in the higher politics the principle is, no matter how insignificant its direct operation at the moment may be. Political, like moral importance, depends upon the principle, not the value at issue. Judas was not the less a traitor for taking but thirty pieces of silver.

The debates of the framers of the Constitution of the United States, on this instrument, are valuable authorities,

for, in several respects, their time was a classical age in our constitutional history.

A period may be classical as to commercial law, while not in other respects.

Here it may be mentioned, that authorities may become very strong in an indirect way, namely, if we find that certain principles are acknowledged, *even though* the person, country, or period to which it belongs, are hostile to the subject in general, so that the statement of these principles is to be considered as one of the last points of truth, which even they could not deny. If we find a principle of British liberty acknowledged even by a Henry VIII., without his having had a momentary and direct advantage in view, it is a strong authority in favor of it. If we find that even in China, the government of which is perfect absolutism, theoretically founded upon parental authority and filial obligation, and democratic equality among all below the emperor, that even there the maxim is acknowledged, that "it is equally criminal in the emperor and the subject to violate the laws," it is strong authority in showing that the law should be superior to every individual will. It surely was good authority in England, before the prisoner was allowed counsel, that even Lord Jeffreys declared it a "cruel anomaly that counsel was permitted in a case of a few shillings, but in a case of life and death not."

IX. *What motive prompted him?* The necessity of carefully attending to this question, has been shown, in section vii. of this chapter, but it is important to add a few remarks.

In citing authorities, it is but too often forgotten, that

individuals, as well as periods, however distinguished for certain principles or courses of action, have their phases, to which we must direct discriminate attention, lest we be misled in a very disastrous manner. Lord Coke is very staunch authority on many points, but not when, in 4 Inst. p. 65, he advocates the Star-Chamber in round terms, and calls it "the most honorable court in the Christian world' the parliament excepted." Coke, when he drew up the Petition of Right, was in a very different phase from the one he appears in when prosecuting Essex or Raleigh, or when he endeavored to reëstablish himself in court favor by marrying his daughter to a brother of Buckingham. Lord Bacon is a very excellent authority on some points, but not when willing to rack Peacham, which he knew was against law, or when he shamelessly attacked his benefactor Essex, or when he makes a distinction between betraying justice for bribes, and merely promoting justice for bribes by dispatching cases. Chief Justice Hale is a very excellent authority on some points, but not as to the justice and expediency of trying and punishing witches.

To be brief, nothing is more important in law, politics, history, belle-lettres, or any branch whatever, in which we acknowledge authorities — and more or less we must acknowledge them in all — than clearly to present to our minds the peculiar provinces in which we admit them, and then only to admit them if no particular and sufficient reason obliges us to exclude them. On the other hand, if we are fully convinced that a period, or individual, is classical, in the forementioned meaning of the term, on some certain points, it is not sufficient to disregard them merely because we cannot at once see their reasons. We must

have specific reasons to discard them; for the idea that they are classical is that then there existed circumstances peculiarly favorable to decide the point, or to form their judgment, — circumstances which we cannot at will reproduce. And in decisions on all important matters, much depends upon a certain instinctive feeling, not derived from any course of reasoning, an inclination of our mind one way or the other, in nicely balanced cases, not from whim, but in consequence of long experience, and the effect of a thousand details on our mind, which details, although properly affecting a sound mind, can nevertheless not be strictly summed up. That expression, "depend upon it, it will turn out so or so," is very frequently used by those who have no reason in their vacant minds to assign for their opinion, yet it is also of great importance if pronounced by men who do have much experience and a sound mind. Almost every council of war affords instances of this kind. The great general very often knows that a manœuvre will turn out so or so, but, in many cases, he cannot prove it mathematically. A man like Pitt acquires a tact in government measures; and even in matters of law and right, which are very nearly balanced, so much so, that those who have not a long experience in these matters, cannot come to a conclusion, the tact of a Marshall, an instinct, if the word be preferred, may choose the right side. I repeat it, this tact or instinct is not depending upon arbitrary preference, or whimsical choice, — if so, it is totally to be abhorred, — but it is the effect of long experience in many detailed cases, of practice, upon a mind originally of peculiar fitness for the respective branch in which the important case arises.

If we find that Grecian architects always ornament their architrave with eighteen drops, we may depend upon it that their unequalled sense of the beautiful induced them to adopt this number and its distribution in three rows, as the only ones which harmonized with the whole character of the fabric, and, unless we discover that there were reasons for adopting this number which do no longer exist, we should act presumptuously in deviating from it, if we adopt otherwise their whole style.

Laws are, in a certain respect, authorities. They have been adopted for some reason or other, and the rule just stated applies to them. It is not sufficient reason to abolish them that we do not at once perceive their use; we must see their positive defects over-balancing their good, or that it be possible to obtain the same good by other means, without incurring the same disadvantages, before we alter them. Otherwise each individual constitutes himself a judge in all matters, as being wise and expert in all branches, which is impossible.

X. *What internal evidence has the authority?* That we ought not to disregard this point any more in the criticism of authorities in law and politics, than in history or any branch whatever, is sufficiently clear. If an opinion from the very highest and most respected source should bear evidence, in itself, that it was given upon faulty principles, we are bound, of course, to discard it at once; for instance, Hale on witch trials, as already mentioned. For this reason, among so many others, which are equally strong when applied here, as in the case of precedents, we should bear in mind that it is necessary that we should

apply to authorities, what was found so necessary a principle in precedents, that each case must necessarily be taken with all its adjuncts. It is necessary to know the very language of the authority, for otherwise we cannot give to the words their full meaning, and for this reason, again, authorities must be taken with the more caution, the more remote they are from us, unless they come from a classical age, and we do not live in one directly concerned with the point at issue. "The modern reports, and the latest of the modern, are the most useful, because they contain the last, and it is to be presumed, the most correct exposition of the law," says Chancellor Kent. It might be added, because they relate to cases applying to the same circumstances and conditions with our own; they speak the same language with ourselves.

XI. *Of what extent is the authority?* That this is a question of the highest moment in politics and law, appears at once, if we consider that both are matters of experience, not indeed of expediency — I hope I shall not be so radically misunderstood — but of experience, that is, they consist of sound rules derived, by reflecting minds, from the operation of those means to which men have resorted in applying the principles of right and justice to existing cases, or those measures which have most promoted their development or security. If we see that the plan of dividing the legislative department into two branches, or chambers, is almost universally adopted by the constitutional nations of our race, and that the more constitutional law is understood, the more the plan is cherished, it affords good authority for adopting it, even if the people have not yet had a chance

to try it, or cannot yet precisely see the admirable operation of this principle, far more important in so called popular governments than even in others. The Belgians acted right in adopting it, whatever even a Franklin may have said to the contrary. If the independence of the judiciary is daily more and more acknowledged by constitutional nations, it forms good authority in favor of it. Here, as in all cases, we must be convinced, of course, that others act on the same primary principles which we may have acknowledged as essentially important. Otherwise our rule might be made to work in favor of persecuting heretics, whipping soldiers, disallowing counsel to criminally indicted persons, leaving the mass of the people without schools, or imprisoning together, pell-mell, the accused and the sentenced. We must be convinced that those who have adopted the measure in question act with us on the same principles, or on principles we acknowledge as good, and that with them the measure is neither the consequence of chance nor the effect of sinister motives, but carefully adopted or developed on those principles.

SUPPLEMENTARY NOTES,

BY THE EDITOR.

NOTE A.

BIBLIOGRAPHY OF INTERPRETATION.

Writing at a distance from large libraries, and without the use of any works treating professedly upon Bibliography, I cannot hope that this list of books and treatises on the subject is complete. I have thought it worth while, however, to enumerate here such as have come to my knowledge, for the sake of students who may wish to pursue the subject further. The list is confined to legal and political interpretation, and does not include works upon Biblical Interpretation, etc.

Early works of the civilians, nowhere accessible in this country, and hardly to be found in Europe except in a few great libraries, have also been omitted. Lists of them may be found in all the larger bibliographical works, and also in the following books of easy reference: —

Weiske. Rechtslexikon. Bd. IV., pp. 701, 702.

Gluck. Ausf. Erlauterung dee Pandekten. Bd. I., pp. 205, 261, §§ 29–36, notes.

Eckhard. Hermeneutica juris. *(See below.)*

And less fully in most of the later German manuals of legal study. To copy any of these lists would be an easy display of useless erudition. With the exception of about half a dozen works of note, the following list includes only such references as the editor could make from personal examination: —

Fr. Hotomanni. Jureconsultus, sive liber de optimo genere juris interpretandi. Bas. 1559. Also in collected works, Tom. II., p. 1087 seqq.

Forster. Interpres, sive de interpretatione juris libri duo. Vitel. 1613. Also in Otto's Thesaurus, Tom. II., p. 945 seqq.

Placcius. De jureconsulto perfecto, seu interpretatione legum. Homb. 1693.

Wittich. Principia et subsidia hermeneuticæ juris. Gotttingen. 1799.

G. Hufeland. De legum in Pandectis interpretandarum subsidio, ex earum nexu et consecutione petendo. Jena. 1795. 4to.

A. Barbosæ. Tractatus Varii. Lugduni. 1651. Folio.

This is not usually enumerated in lists of works on Interpretation, but deserves more attention than it has received. It is a perfect dictionary of the early interpreters' results, arranged alphabetically under the five heads of (1) Axioms, (2) Appellatives, (3) Loci communes, (4) Clauses in common use, (5) Phrases in common use.

F. Rapolla. De jureconsulto, sive de ratione discendæ interpretationis juris civilis. Naples. 1726. 8vo.

C. H. Eckhard. Hermeneutica juris. Jena. 1750.

——— Edited by C. F. Walch. Leipsic. 1779.

——— Edited by C. W. Walch. Leipsic. 1802.

A. F. J. Thibaut. Theorie der logischen Auslegung des römischen Rechts. 1799.

——— Pandektenrecht. §§ 43–56, 1001. (Translated, with notes, by Lindley. *See below.*)

J. G. Sammet. Hermeneutik des Rechts. Leipsic. 1801.

G. S. Teucher. De natura et formis interpre et hermeneutices civilis observ. Lips. 1804.

K. S. Zachariä. Versuch einer allgemeinen Hermeneutik des Rechts. Meissen. 1805.

——— Vierzig Bücher von dem Staate. Book XX., chap. 5 (Vol. IV., pp. 36–44).

F. Maglianus. De juris interpretandi ratione. Naples. 1808.

M. A. Mailher de Chassat. De l'interpretation des loix. Paris. 1822.

W. L. Clossius. Hermeneutik des Rechts. Leipsic. 1831.

J. H. Böhmer. De interpretationis grammaticæ fatis et usu vario in jure Romano.

Preface to his edition of Brissonius. Also in his Exerc. ad Pandectas. Tom. I., pp. 22–93.

——— De verbis directis et obliquis. (Exerc. ad Pandectas. I., 94–142.)

Wolfii, Christ. Jus Naturæ methodo scientifica pertractatum, etc. Francofurti et Lipsiæ. 1740. Tom. VI., pp. 318–413. Pars VI., cap. 3, §§ 459–560.

Grotius. De Jure Belli et Pacis. Lib. II., c. 16. And also the brief treatise, De Interpretatione, usually printed at the end of that work.

Voet, J. Comm. ad Pandectas. Tom. I., tit. 3, §§ 18–24, 36, 44; tit. 4, §§ 16–19; Tom. V., lib. 34, tit. 5, §§ 1–5.

Lange. Begrundungslehre des Rechts. 1821. 12mo. §§ 37–93, pp. 37–95.

Mühlenbruch. Doc r na Pandectarum. 1823. Vol. I., cap. 3, §§ 53–68, pp. 129–160.

Vangerow. Leitfaden. Bd. I., pp. 33–45.

Savigny. System des römischen Rechts. Bd. I., cap. IV., §§ 32–50, Vol. I., pp. 206–330.

Trendelenburg. Naturrecht auf dem Grunde der Ethik. §§ 71–83, pp. 166–191.

Windscheid. Pandekten. I., §§ 20–6, Vol. I., pp. 49–63.

ENGLISH AND AMERICAN WORKS.

I have included un ler this head all references to works in our language, including some that are translations or of foreign authorship, having in view rather the convenience of the reader than a strictly accurate classification.

Dwarris, Sir Fortunatus. A General Treatise on Statutes, their Rules of Construction, and the proper Boundaries of Legislation and of Judicial Interpretation, etc., etc. Second edition. London. 1848. 2 vols. 8vo.

The interpretation and construction of statutes is especially the topic of Chap. IX., pp. 550–712 of Vol. II.

——— New edition, with American notes and additions, etc. By Hon. Platt Potter. Albany. 1871. 1 vol. 8vo.

Omits most of the historical part of Dwarris's work, and other portions, for which the additions hardly form a satisfactory substitute.

Sedgwick, Theodore. A Treatise on the Rules which govern the Interpretation and Construction of Statutory and Constitutional Law. Second edition, with notes. By J. N. Pomeroy. New York. 1874. 8vo.

Chapters VI.–IX. have most direct reference to the subject of Interpretation.

Smith, E. F. Commentaries on Statute and Constitutional Law, and Statutory and Constitutional Construction. 1848. 8vo.

Cooley, Thomas M. A Treatise on the Law of Constitutional Limitations upon Legislative Power in the several States of the American Union. Fourth edition. Boston. 1878. See especially Chap. IV., pp. 38–83.

Lindley, N. An Introduction to the Study of Jurisprudence. (Translation of the General Part of Thibaut's Pandekten, with notes relating to English Law. See especially §§ 43–56, and notes in Appendix.) American edition. Philadelphia. 1855.

Abbott, Benj. V. A Dictionary of Terms and Phrases in American or English Jurisprudence. 2 vols. Boston. 1879. (This useful work appeared after the matter of the present edition was entirely prepared, and most of it printed. Consequently I have had no opportunity to make use of it, or even to omit from these notes, as I should otherwise have done, any thing that might be found treated of there.)

Lieber, Francis. Civil Liberty. pp. 205–8.

Wooddesson's Lectures. Vol. I., pp. 31, 32.

Sheppard's Touchstone of Common Assurance. Chap. V.

Fonblanque on Equity. Book I., chap. 6.

Evans's Translation of Pothier on Obligations. Vol. I., pp. 91–102, and App. No. V. in Vol. II.

Vattel's Law of Nations. Northampton. 1805. 1 vol. 8vo. Of the Interpretation of Treaties. Book II., Chap. XVII., §§ 262–322.

Rutherforth's Institutes of Natural Law. Vol. II., Chap. VII. Of Interpretation. pp. 300–358. Ed. 1799. Whitehall. 2 vols. 8vo.

Bouvier's Institutes of American Law. Philadelphia. 1876. 2 vols. 8vo. Vol. I., §§ 86–91, 661.

Powell on Contracts. New York. 1825. Vol. I., pp. 221–247.

The best discussion of the interpretation of contracts with which I am familiar in English. See Note on that subject, *post.*

Maxwell, Sir Peter. On the Interpretation of Statutes. London. 1875. 8vo.

Hardcastle, H. A Treatise on the Rules which govern the Construction and Effect of Statutory Law. 8vo. London. 1879.

Gael. A Practical Treatise on the Analogy between Legal and General Composition. London. 1840.

Austin, John. Lectures on Jurisprudence. 2 vols. 8vo. London. 1863.

1. Statutes passed for purposes of interpretation are not strictly laws. p. 100, I.

2. Spurious kind of interpretation called extensive; equity of a statute. p. 40, I.; pp. 596, 651, 1029, II.

3. Interpretation of statute law. p. 66, I.; 644, II. Differs from induction of judiciary law. p. 649, II. Reference to Sir Samuel Romilly and Paley. p. 653, II.

4. What is the true and proper object of interpretation? p. 1023, II.

5. How the intention of legislature is discovered; from literal meaning of words; sometimes from other indicia. pp. 1023, 1024, II.

6. Causes which have led to extended or restricted interpretation; this is really judicial legislation. pp. 1025, 1026, II.

7. In what sense interpretation proper may be restrictive or extensive. p. 1027, II.

8. Grammatical as opposed to logical interpretation. pp. 1027–9, II.

NOTE B.

ON THE DIVISIONS OF INTERPRETATION BY VARIOUS AUTHORS.

Although the Roman jurists used the term *interpretatio* in the widest possible sense (as will be seen in a subsequent note), they made no effort to distinguish its various kinds. The earliest attempt of this kind which has had an influence on our modern legal phraseology was that of the Glossators and their immediate followers. It was their task, not merely to draw out and explain to their contemporaries the vast stores of legal principles and rules contained in the revived Roman law, but also to make them applicable to the institutions and relations of their own day. Hence they were led to use a freedom of interpretation little, if any, inferior to that of the classic jurists who were the original authors of that law. In one respect, at least, they went beyond them: the notion of usual or customary interpretation was forced upon them by the very circumstances of their task, in a breadth and variety of application unknown

before. Consequently we find the distinction of *authentic* and *usual* interpretation recognized in almost every page of their writings, though not always in the strict sense in which they were afterwards defined. The interpretation of a law by the prince himself, or by one of his judges, was binding, and a part of the written law itself. Glo. in D. de legibus (I., 3) and gl. in c. 2, Cod. de legg. (I., 14). That made by custom was equally binding, but not a part of the written law. *Ibid.* That of a doctor of law, or of a *majister* (as the teachers in the law-schools were then called), was not binding, but had such weight as its reason gave it. Gl. in c. 2, Cod. de legg. (I., 14). Whether the prince could delegate his authority to particular jurisconsults, and thus make their opinion binding, and a part of the law itself, was a disputed question, in the discussion of which we see the natural reason and common sense of the mediæval lawyers, struggling against the letter of the imperial law upon the well-known Responsa Prudentum.

Upon the effect of interpretation, we find it already laid down in clear terms that the expression, in its proper sense, denotes the plain meaning of a word, but is sometimes taken for the correction, restriction, or extension of that meaning.

Interpretationis verbum in sensu proprio denotat vocabuli apertam significationem, quandoque sumitur pro correctione, arctatione et prorogatione. Gl. in L. 2, Dig. de Origine Juris (I., 2).

But the tendency to overlook the plain and obvious part of the process, and to think of interpretation as necessarily implying some active influence on the meaning of the word, different from the plain meaning, was already perceptible, and obscured the true nature of the process, as it has continued to do down to our own day. The view against which Dr. Lieber warns us at the end of Chapter I. could hardly be more succinctly stated than in this passage: —

Interpretor verbum idem est quod corrigo, quandoque idem quod apertius exprimo, item idem quod prorogo. Gl. in L. 1, § filio, Dig. ad Tertyll (XXXVIII., 17).

We read frequently of benign, favorable, full, odious interpretations, but none of these terms seem as yet to have become technical, or to have been reduced to a system. The nearest approach to one that I have observed in the Gloss is where the rule is given of "full interpretation for contracts, fuller for last wills, fullest for rescripts and benefices." Gl. in L. 21, Dig. de V. S. (L., 16), and elsewhere.

But in the three centuries that intervened between the Glossators and the great reform of jurisprudence led by Alciatus and Cujas and their contemporaries, there grew up a complete art of interpretation, the technical terms of which have survived to our own day. To elaborate the rules of such an art was in full accordance with the taste of the age, and the method of the so-called *Scribentes*, whose name fully expresses the interminable labor of filling huge folios with all that could possibly be written on the law, to which they devoted their lives.

The language of Azo upon this subject has a peculiar interest for English and American lawyers, even where it has not been directly transcribed by Bracton. In the first place, it gives us, in a clear and consecutive form, the best results of the legal thinking of the age by which the Roman law was revived and first applied to the affairs of modern Europe. As a summary of the entire jural system of the Glossators, the works of Azo may at least be placed upon an equality with, if not above, the oftener quoted Accursian gloss. But, more than this, his works had unquestionably the greatest influence upon the formation of our own common law. No common lawyer can read the *Summa Aurea*, as it was proudly called, without being struck by the number of his expressions, rules, distinctions, etc., which have found their way into our own early common law. I do not refer here to the direct quotations made by Bracton, but to those scattered through other parts of his works, which Bracton did not touch. They are so numerous, and some of them so peculiar, that even if we did not know of Bracton's indebtedness to him, I think there could be no doubt that the writings of Azo were more generally studied by English judges and lawyers, in the formative period of the common law, than those of any other civilian. Bracton has left out all his passages (I think) upon interpretation, probably because he regarded them as not strictly appropriate to a work on unwritten law. But a brief abstract of them may not be without interest, as bearing on the connection between the revived civil law and our own.

After pointing out that the matters with which the prince or sovereign has to deal may be classed under the three heads of mere equity, settled law, and that which is observed as law, and that with the settled law they deal in four modes, viz., by interpreting, by correcting, by restricting, and by enlarging it, Azo proceeds (Summa Codicis, Lib. I., tit. 1, ed. Lyons, 1596, p. 3): "And the word interpreting is a general one, covering all these above mentioned, for he who corrects is said to interpret." He

then goes on to furnish examples of its use in the different senses, not only with reference to the settled law (jus approbatum), but also to legal acts, such as wills, contracts, etc. (id quod servatur pro lege): "By interpretation they make a condition to be annexed, which was not annexed; as, where two sons are made co-heirs, with a request that each shall make the other his heir upon his death; for the condition is here implied, if he die without leaving children. L. si pateo, Inst. de hæred. instituendo (II., 14). And they make a condition actually annexed, to be void; as, if it be impossible, or immoral. L. reprehendenda, Inst. de inst. et subst. They interpret a condition as fulfilled, which is lacking; and again, one as lacking which is fulfilled: as, where several conditions are added in the alternative to an inheritance, or a *fidei commissum*, and one of them is fulfilled; the condition seems to be performed, but the law interprets it as not performed, taking the disjunctives as conjunctives. L. generaliter, Inst. II., 14." And after more examples of this kind, Azo says: "But all these *fictions or interpretations*, in the aforesaid cases and in others, I find may be generically classed under the ten predicaments." And he then goes on to show this by instances of interpretation or change of the law, classed under each of the ten predicaments, viz., substance, quantity, relation, quality, action, passion, possession, place, time, situation (pp. 4, 5). In another place (Lib. I., tit. 14, No. 12, p. 31) Azo says: "Who interprets laws? All who can make them; so, also, custom interprets the law (L. si de interpretatione, and L. minime, Dig. eod.). So, likewise, a teacher of law interprets it. But that interpretation is not binding. 'Nam nemo est addictus jurare in verba magistri.' (Azo evidently plays upon the word "magister," which was the technical term in his day for a teacher of law.) So, likewise, a judge interprets a law in a cause; and this, whether the doubt be on the words of the law, and how they are to be understood, or whether it be on a case which is not comprehended in the law. Nor is this inconsistent with the words of the Institutes, that it is lawful and proper for the prince only to judge of the interpretation to be interposed between the strictness of the law and the wider rules of equity; for it is his sole prerogative to render an interpretation which shall be general and binding, and reckoned a part of the written law. But while usual interpretation is general and binding, it is not to be reckoned a part of the written law, though any one may by choice and for his profit reduce it to writing, that it may be remembered." (The distinction here made by Azo, between the force of written law, and of law that remains unwritten,

though reduced to writing, could hardly be better expressed in our own day. Indeed, much confusion might be saved, if all modern writers on the law kept it in mind. Compare with it the remark of Sir H. S. Maine, Ancient Law, pp. 12, 13.) "And it is well to consider when recourse may be had to any of the forementioned methods. The doubt sometimes arises upon some new state of facts, and sometimes upon a law. In the former case, the emperor must be consulted, provided he is at hand and accessible. But if not accessible, we must proceed by analogy. (De similibus ad similia.) If, however, the doubt be on the law, and there has been a certain understanding of it by custom, that understanding must be adhered to. But if the sense of the law has not been made clear by custom, then in this case also recourse must be had to the prince, if accessible; otherwise, the more favorable interpretation is to be taken. No interpretation is to be made against the party in whose favor any law has been made; but if doubt arise which be the more favorable interpretation, we must adhere to the sense of the words. It might seem that this sense should take precedence of the other considerations; but this is not so, as has been shown. And the last resort is analogy."

The chief interest of these passages, at the present day, lies in the number of different expressions which were afterward worked out into distinct methods of interpretation. It is evident that Azo regarded analogy as a means of interpretation, and not in the light in which it is presented by recent writers. At the same time, his reference to it as belonging particularly to cases where the doubt arose from the facts of the case, shows that the main difference, between his view and the modern one, was in the broader sense given to the term *interpretation*. This included, with him as with the Romans, all the processes that went to the formation of new law, except, perhaps, that of legislation in its strictest sense; but at the same time the overshadowing influence of the great Roman texts was preparing for that branch of the subject which we still recognize as interpretation a predominance over the rest, which it never again lost. This must explain why Bracton rejected the whole subject from his work, and thus did more than all others together to differentiate the character of English law from the Continental systems. Up to his time, England seems to have been fully as ready as any of her sister states to adopt the civilian jurisprudence. In some respects she had made greater advances than the very states the law of which has since been most thoroughly Romanized, such as Germany and Spain. The sudden

change of tendency which we remark about the reign of Edward I., or soon after Bracton wrote, is the most interesting, and perhaps the most difficult problem in the history of English law. It would no doubt be a great exaggeration to ascribe this entirely to Bracton's rejection of the civilian doctrine of interpretation. But that undoubtedly contributed to the change, and it may be still more significant, as itself an effect of the deeper-lying causes to which the change was due. To suppose that Bracton rejected interpretation because it was applicable only to written law, would be to give him a view much in advance of his age; but it may still be true that he rejected it because of its tendency, at the time, to exaggerate the importance of written law, and especially of authentic interpretation. It is certain that no English lawyer, from his time down to a very recent period, has treated professedly of interpretation, and this omission has been of the greatest importance in determining the form of the English law. Even the many maxims on this topic, with which Coke and other writers deck their pages, were evidently culled in a foreign soil. Scarcely one of them can be found of indigenous growth.

It should be added, however, in this connection, that among the civilians themselves there appears to have been a decline in the attention given to formal interpretation, contemporaneous with that great revival of a more vigorous and masculine jurisprudence which marks the sixteenth century. In the writings of Cujas and Duarenus, the two greatest jurists of that age, we find scarcely a word on the subject. They interpreted the laws freely and ably, but they spent no time upon the technical rules of the process. The same period was marked by brevity and compactness of legal style. Le Moine, who, in his preface to his Diplomatique Pratique (Metz, 1765), complains of the prolixity of French law and conveyances, attributes them to the following century: "Lorsque les styles eternels du 14e siècle prirent la place de cet admirable laconisme qui caracterisset le siècle precedent."

There is a very remarkable passage in the Commentary of Cujas to the title *De liberis et postumis* (Opera II., 222 e, ed. Francofurti, 1623), in which he distinguishes interpreting from supplying the sense of a passage. "We supply particular things; we interpret general ones. To supply is to extend, and, as it were, to amend the meaning. § 1, Inst. de bon. poss., III., 9. To interpret is neither of these. We cannot supply where there is no law; *we can interpret even without a law.*" The last sentence is very significant, as showing that Cujas still held to the loose and comprehensive

meaning of the term, while disposed to limit its employment and abuses as much as possible.

But the terms and rules of the earlier writers were preserved through this period by compilators like Menochius, Barbosa, and a host of other now forgotten "practical" writers, and in the latter part of the seventeenth and eighteenth centuries were elaborated into a formal system by "those civilians of marvellous erudition" (Anc. Law, p. 110), but little genius, who then filled the chairs of Holland and Germany.

By these writers, interpretation was usually divided into three kinds, according to the source from which it proceeded, — viz., *legal* or *authentic*, *usual* or *customary*, and *doctrinal*. The first was that which proceeded from the legislator himself. It was a fundamental maxim that whoever had the power of making law had the like power to interpret it; and with the very liberal meaning given to the term *interpretation*, and the paramount authority attributed to the compilation of Justinian (the fragments or passages of which are usually meant by writers of this period, when the term *leges* is employed without qualifying words), this branch of the art had a relative importance much greater than it has ever since enjoyed. (See Note F, *post*, on Authentic Interpretation.)

The second, or *usual* interpretation, was that derived from custom and usage. By this was then understood, not the meaning given by usage to particular words or expressions, but all the law which grew up in the course of centuries by the combination of the *lex scripta*, or Roman law, with the customs of the various nations that received it. A favorite field for the exercise of professional ingenuity was the interpretation of the former in such manner as to find therein formal written authority for the institutions, rules, and usages that the Germanic races had inherited from their ancestors. For a century past, it has been one of the chief tasks of the Continental jurists, and especially of the class among them known as Germanists, to restore these remains of national law to their original shape, free from the distortions and disguises forced upon them by this Romanizing process. Our own English law suffered far less from such interpretation, though traces of it are to be found even there. But the mistakes made in England in applying the language of the Corpus Juris to native customs, if less numerous, seem to have been still grosser; as when Roman maxims and rules were applied to English institutions with which they had nothing to do, simply from a resemblance, real or fancied, between their names.

For the validity of this process of customary interpretation the civilians found ample warrant in the often-quoted passage of Paulus, "The best interpreter of laws is custom" (L. 37, Dig. de legibus, I., 3), and the many other like *dicta* of their authorities. Hence some of the writers of the period now under consideration included *usual* as well as *authentic* interpretation as species under the general term of *legal* interpretation, thus giving both the preference, in point of authority, over the third species named above, *i.e.*, *doctrinal* interpretation.

This last was defined as the interpretation given by "doctors" (teachers of law) and other learned jurists not possessed of legislative authority. It differs from the other two kinds in not having, as they did, equal authority with the text interpreted. It rested upon its own intrinsic reasonableness and the arguments produced for it; and also, as a matter of course (though this was not so explicitly mentioned), upon the fame and number of the doctors who could be quoted in its favor.

The foregoing divisions were based on the sources from which the interpretation was derived. A different one, found in the same writers, expresses the nature of the interpretation itself. This was, *simple*, *declarative*, or *explicative*, *extensive*, and *restrictive*. These terms hardly need explanation, for they have come down in substantially the same senses to our own time. So far as the definitions and rules given for each respectively retain any interest for us now, they will be mentioned in their proper connection hereafter. The appearance of the division in writers of this period is chiefly interesting as marking the first attempt to reduce the "favorable" and "odious" interpretations of their predecessors to something like fixed principles. *Extensiva interpretatio respicit favorem*, *restrictiva odium*, is a remark quoted by Struve from an earlier writer; pointing out the path by which jurisprudence advanced from a mere subjective disposition to favor or to begrudge the operation of a rule, to the conception of fixed rules by which the wider or narrower scope of the law was to be measured independent of the interpreter's wishes. But a great step forward was made in jurisprudence when it was first clearly shown that there were two entirely different processes of interpretation, the one of which concerned itself with the exact meaning of the words as they stood in the text, and the other of which looked beyond the meaning to some other standard. What that standard might be was not always agreed; but it was the more advantageous on this account to have all questions as to ground and purpose of the law, equitable constructions, analogies, etc.,

remanded to a distinct part of the subject, away from grammatical interpretation, which was thus allowed to deal uninterrupted with the plain sense of the words. Under this latter head naturally fell what had previously been called *simple* or *literal* interpretation, and the cases where no interpretation was necessary, according to the theory that interpretation dealt only with obscure or difficult passages. The true force of the text was felt more clearly when these plainer cases were put by themselves; and we probably owe to this division our modern freedom from the extravagant and forced constructions so common in earlier law, especially in cases where a pretence was made of following the equity of a statute. The Roman jurists themselves, loose as their notion of interpretation was, could not help protesting against the abuse of this term (Paulus, in L. 91, § 3, Dig. de V. O. (XLV., 1), and acknowledging that words so interpreted defied all definition. Scœvola, in L. 14, pr. Dig. de div. temp. præscript. (XLIV., 3). For the later abuse of equitable interpretation, see the note on that subject, *post*. If, with our more liberal notions of construction in general, we are comparatively free from such abuses, we owe it, in part at least, to the exclusion of *equitable* from the field of grammatical interpretation.

A much greater advance, however, in the same direction was made when the distinction was first recognized as that of *grammatical* and *logical* interpretation. The previous distinctions had dealt with the sources of interpretation — *authentic*, *usual*, *doctrinal;* or with the effect — *simple*, *extensive*, etc., as enumerated above. But this relates to the very nature of the process, and implies, as well as opens the way for, a scientific theory of that process. Consequently it has retained its place in works on the subject to the present day.

When these terms were first used, I am not prepared to say. I have not found them in any writer before the sixteenth century, and they do not become the principal divisions of the subject before the eighteenth. There are, indeed, much earlier references to the difference between the words and the intention of the law. That distinction is too obvious to escape notice. It is made by the classic jurists under such terms as *verba legis*, *sententia legis*, and is clearly enough referred to by Cicero and Quintilian. The essay of Thibaut on the Logical Interpretation of the Roman Law, first published in 1799, marks a new epoch in the treatment of the subject. Although Thibaut introduced no new terms, yet the clearness with which he defined those in use, and reduced the whole process to a few

simple elements, made the elaborate divisions of his predecessors seem like mere verbiage. He made logical interpretation to deal alone with the reason of the law and the intent of the legislator; grammatical, on the other hand, to pay exclusive attention to the meaning of the words employed, its task being ended when the sense of the law could not be ascertained by the common rules of language. He held, therefore, that the latter was clearly and entirely excluded in the case of ambiguous laws, since a law could not be ambiguous if its meaning were determinable from its words. Theory (2d ed.), pp. 15, 16. Again, the intent of the legislator, and the reason of the law, formed, according to Thibaut, the two grounds upon which all logical interpretation must be based. Equitable interpretation, restrictive or extensive, with all the reasons given for it, and the multitude of terms by which it has been designated, belongs, therefore, entirely to the field of logical interpretation, and is entirely a different thing from that choice between the broader or the narrower sense of words (interpretatio lata, stricta) which is a part of the grammatical. Theory, p. 52.

Of the connection between this theory and Dr. Lieber's distinction of construction and interpretation I shall speak in another place.

Thibaut's great rival, Savigny, made what he considered an improvement upon this, by adding to the divisions of grammatical and logical two others, viz., historical and systematic, and defines them thus: "The grammatical element deals with the language by which the legislator's thought is made our own; and it consists, therefore, in showing by what rules of speech the legislator was governed."

"The logical element analyzes the legislator's thought, and the relation in which its several parts stand to each other."

"The historical element has for its task the previous condition of the law, and the change made in it by the law to be interpreted."

"The systematic element deals with those interconnections which form the whole law into harmonious unity, and the position which the new law is intended to take in that unity." System, Vol. I., § 33, pp. 213, 214.

It seems plain that in these two last elements we have rather two important portions of the material from which our interpretation is to be made, than elements of the process itself.

This account may properly be closed with the following free translation of a passage from Holtzendorf's Encyclopædia, Vol. I., pp. 262, 263, in

which Prof. Bruns, of Berlin, gives the most recent exposition of the present theory: —

"It is the first duty of the interpreter to determine the exact meaning of each rule of law, — *i.e.*, the thought of the legislator in enacting it. This may be done in two methods: *à posteriori*, from the words, as the expression of the thought, to the thought itself; or, *à priori*, from the motives or elements from which the legislator himself has proceeded.

"(1.) The former method, *à posteriori*, includes —

"(*a.*) The lexical meaning of the several words used.

"(*b.*) The grammatical construction by which these words are united into sentences.

"(*c.*) The combination of these sentences to express a thought, according to the rules of formal logic.

"(2.) The elements out of which the thought or purpose of a law is compounded, and from which, therefore, *à priori* conclusions as to its contents may be drawn, are its past, present, and future, — *i. e.:*

"(*a.*) Its origin and growth from antecedent circumstances, or its historical connection with the whole system.

"(*b.*) Its dogmatic connection with the system, as *jus commune, jus singulare.*

"(*c.*) Its legislative purpose or intended effect.

"Both ways or means must, of course, be employed for the complete interpretation of a law; they complement and prove each other mutually. It is a gross mistake to suppose that the words alone compose the law, and that the meaning or spirit — the more ideal elements — can only be appealed to when the words themselves are ambiguous. Yet this has been the traditional view, formulated in the expressions (inexact even on this view) of grammatical and logical interpretation. Savigny has successfully refuted this view, but has been less successful in trying to replace it with a new division into four elements of interpretation, — grammatical, logical, historical, and systematic.

"The law which is to be interpreted consists essentially in the imposition of a certain definite rule, upon definite facts, for definite reasons, which are found in definite properties of the facts to be governed by the rule. A distinction is made, therefore, between *dispositio legis* and *ratio legis.* Both are objects of interpretation, since the scope of the disposition can only be ascertained by the reason of the law; and the purpose of the law is, properly speaking, the law itself. The words are only the means of expressing the thought or purpose; and this is truly the law. Conse-

quently, obscure, imperfect, or ambiguous words must be interpreted, wherever possible, by the intention of the legislator, otherwise ascertained; and if it is plain that the words and intention do not agree, the intention governs. Words too restricted must be extended, too extensive must be restrained by interpretation. Still, in cases of doubt, the words must be adhered to; and merely harsh, inequitable, or impolitic provisions are not, of themselves, a sufficient excuse for departing from the tenor of the words." (Bruns, *ubi supra.*)

I should have been glad to add to this note, if I could, some account of the manner in which interpretation has been treated by English writers upon law since the time of Bracton, of whose evidently intentional omission of the topic I have spoken above. But there is not, so far as I know, material for such a sketch in the entire body of our common law. The few English writers who have treated of the topic at all, have done it entirely upon civilian models. The rest have ignored it altogether. There is a curious passage in the "Doctor and Student" which shows that in the sixteenth century the word was taken in the loosest possible sense, and even opposed to the strict notion now conveyed by it, and which was then represented by the term *exposition:* —

"Truth it is, that sometimes the intent of a statute shall be taken farther than the express letter stretcheth; but yet there may no intent be taken against the express words of the statute, *for that should be rather an interpretation of the statute than an exposition.*" Doctor and Student, Dialogue I., c. 28 (Clarke's ed.), p. 83.

The most elaborate treatment of the subject that I have found in an English work, prior to the present century, is in Rutherforth's Institutes; and that is hardly an exception to what has been said, since Rutherforth's work is avowedly little more than a compilation from Grotius. He divides interpretation into *literal* and *rational* (corresponding to the grammatical and logical interpretation of the civilians), but destroys all the value of the distinction by adding, as a third kind, "*mixed* interpretation, partly literal and partly rational; we collect the intention of the speaker or the writer from his words, indeed, but not without the help of other conjectures." Rutherforth's Institutes, Vol. II., p. 307.

He also distinguishes "strict" and "large," and again, "extensive" and "restrictive," interpretations. *Ibid.*, pp. 329–331. The best part of his chapter on the subject is where he shows that interpretation is not confined to doubtful or obscure texts.

Blackstone (Law Tracts, I., 13) informs us that Suarez and Puffendorf,

"writers of eminence and indisputable authority, * * * have reduced all the methods of interpreting laws to three, by considering, first, the very words of the law itself, *verba legis*; secondly, the occasion of making it, *ratio legis*; and, thirdly, the intention of the maker, or *mens legislatoris*. And hence it is manifest" (he proceeds, in his essay on collateral consanguinity, where the interpretation, or rather the construction of the statutes of All-Souls' College, Oxford, is in question) "that the heads of our inquiry must be these: whether from the *letter* of the statute, the *occasion* of making it, or the probable *intentions* of the founder, it appears that the kindred by him spoken of may continue to subsist *in infinitum*."

The only recent attempts by English writers to furnish an original analysis of the process of interpretation, so far as I have examined, are those of Mr. Austin, referred to at the close of the preceding note (A.), and the following, by Professor Amos: —

"Thus, in relation to all the possible qualifications in human acts, as much as to all other matters of which it treats, the language of law assumes a community of knowledge and sentiment on the part of the governors and the governed. Interpretation, in all its forms, is the process by which (1) a real and existing standing-ground, afforded by this assumed community, is determinately ascertained; and (2) where, accidentally, no such community can be so much as even assumed, the most ready and practical devices for carrying out the general, social, and political purposes for which laws are provided." Amos, Systematic View of the Science of Jurisprudence, p. 60.

NOTE C.

ON THE PROVINCE OF LEGAL HERMENEUTICS.

The author has shown in Chapter I. that interpretation is necessary to the understanding of all signs, and is not confined to those which present some special difficulty or obscurity. This is a point of some importance in the definition of legal hermeneutics, since it marks a very different conception of the subject from that current in the older works, where interpretation was treated as a process peculiar to defective or imperfect laws, and it was assumed that laws (and other forms of language)

properly framed require no interpretation.[1] Expressions framed on this view are still to be met with in many writers, who borrow them from older works, or use them without any distinct conception of the subject as a whole. But all who have examined the subject carefully seem now to agree in holding that the province of interpretation is as wide as that of expression, and that the process of interpreting a clear form of words — *e.g.*, a law — is the same in kind with that by which we interpret an obscure or defective one, though the difficulty and complexity of the task may vary widely, and lead to great differences of degree. The result is, as may be seen in the whole of the present work, a much more rational and simple theory of interpretation. As Savigny has well remarked,[2] the true principles of interpretation must be founded on the observation of the process by which we understand clear and perspicuous language, just as the true method of dealing with disease must be based on a careful study of the normal condition and functions of the system in a state of health. Having analyzed and comprehended the mental operations by which we arrive at the meaning of language that presents no special difficulty, we are then prepared to deal with those cases in which, from one reason or another, language fails to fulfil its proper office of imparting to us its full and exact meaning.

But the acceptance of the term in this wide sense makes it at once more important and more difficult to distinguish properly between the *interpretation* and the *application* of language. In legal hermeneutics, especially, this distinction becomes of great practical importance. Its neglect not only has the effect of destroying the proper bounds of interpretation as a distinct province of law, but it leads to an immense amount of confusion and error in the application of legal terms and rules.[3]

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[1] The following passage from Glück will serve to illustrate this view of interpretation: "Interpretation of laws presupposes that there is an imperfect, obscure, or insufficient law to be interpreted. A complete, clear, and definite law *needs no interpretation;* on the contrary, the judge is bound to *apply* it, even though it may seem to him harsh." Ausf. Erlauterung der Pandekten, I., 208. But how shall the judge apply the law until he has ascertained its meaning, or learned to what objects it is meant to be applied? And what will this process be but interpretation?

[2] System des h. R. R., I., 208.

[3] For example, the question how far parol evidence is admissible to contradict or vary written instruments — *e.g.*, a written title to land — is one of interpretation, in the proper sense of the word. On the other hand, the case of a resulting trust does not depend on interpretation at all, but is simply excluded from the application of the general rule. Any one who has had occasion to examine recent cases of these

Laws are necessarily expressed in abstract terms, each of which represents a generalization formed from a great variety of facts in a long period of time by the concurrent action of the entire people in whose language the term is found. Very rarely, if ever, does such a term express a fact coming directly under the observation of our senses. No man ever saw a murder or a theft, a trespass or a conversion by one man of another's goods. What is seen, or directly known, is an outward act, the legal significance of which depends on its relation to many other facts. Such words as those above mentioned constitute the middle terms in the syllogisms to which, as has often been remarked, all legal questions may be reduced.[1]

The process by which, having this term given, we discover its meaning, or the facts which may be subsumed under it, is interpretation; the process by which, starting with certain facts, we ascertain the legal category under which they must be placed, and the rule of law which is to govern them, is that of the application of the law. These two terms, therefore, taken in their full extent, are each the converse of the other: one denoting the process by which we descend from the general to the particular; the other, that by which we rise from the particular to the general. If this were all, there would be no need of distinguishing between them. But differences of degree sometimes are practically as important as differences of kind; and there is a very great difference of degree between the two extremes of the process we have described. The immense variety of facts coming to the cognizance of courts of justice makes the process of reducing these to roughly-framed categories or general terms an indispensable one, occurring in almost every case. On the other hand, it is only the more important terms the interpretation of which receives and rewards careful investigation. Hence the division into two parts: in one of which the process of interpretation prevails; in the other, that of application.

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kinds, in some of our States at least, knows very well that it is impossible to determine from them when a given case will be governed by one rule or the other. The definitions on either hand may be accurate enough, but the connection between these and the facts is so vague that the cases are utterly useless as guides.

[1] In English books the remark is usually limited to pleading. Gould's Pl., Chap. I., §§ 7-25; Lube's Eq. Pl., Pt. II., Chap. I., § 2, pp. 170-175. But the same truth bears a wider application. "The application of every law may be presented in the form of a syllogism, in which the legal provision constitutes the major premise; and after this has been determined, the question is upon the subsumption of facts in the minor." Trendelenburg, Naturrecht auf dem Grunde der Ethik, § 78.

This seems to be the true meaning of the distinction which some modern writers make between interpretation and application. Thus, Vangerow,[1] defining the former term *(Auslegung)* as the derivation of points of law from a given rule,[2] treats of the application of laws as an entirely distinct subject *(anwendung)*, and under that rubric discusses the effect of the law in place and time, the retrospective effect of statutes, etc. But it is evident, as already said, that the difference of the two topics is not in the kind of matter treated, but only in the relative degree of attention bestowed in the one case upon the language employed, and in the other upon the facts to which that language is supposed to be applicable. We interpret language by pointing out the facts to which it is applicable: we apply it by inquiring what facts are embraced in the terms of which the law or proposition is composed; and we name the proceeding as our attention is directed to the one or the other element.

In the reaction from the former error, which supposed interpretation to be applicable only to a limited class of laws (or other signs of expression) supposed to call for it by special obscurity or ambiguity, some writers have gone to the other extreme, and treated the province of legal interpretation as embracing the entire field of law, unwritten as well as written. They argue[3] that interpretation (in the broader sense in which it is used to denote the entire subject or province of the law, including what our author has termed construction as well as interpretation proper) has for its office not only to explain the meaning of the words used by the legislator, but also to ascertain his intention, and to give effect to this intention even when it differs from the literal meaning of the terms employed by him; and that this latter process is equally applicable to the unwritten law.

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[1] Leitfaden der Pandekten-Verlesungen, I., § 21.

[2] Ableitung von Rechtssätzen aus einem gegebenem Gesetze. Compare Savigny's statement, quoted in note 3, upon page 9, *ante*.

[3] Windscheid, Lehrbuch des Pandekten-Rechts, I., §§ 20, 22. "Commonly we speak only of the interpretation of written laws, but that is too narrow; the rules of the customary law are equally capable and equally in need of interpretation. Not, indeed, in altogether the same sense as the statutes, since one task, and that the first, which interpretation has to perform upon the statutes is inapplicable to customary law. Statutes are expressed in words; the rules of law given in them are formulated; the first question is, What sense has the legislator meant to convey by the words he has employed? This question cannot arise in customary law, since its rules do not appear in the form of human language. But after the meaning of the words of a statute has been ascertained, there arises a second question of interpretation, — and this is equally applicable to customary or unwritten law, — the question, What was the intention of the legislator, lying behind his words?" *Ib.*, pp. 50, 54.

If this were true, it would be evident that legal hermeneutics would cover the whole field of law as an applied science, and that any attempt to treat it as a separate province would be useless. But a little reflection discloses the fallacy. Of the process by which we determine what the unwritten law applicable to a given case is, there is a portion which exactly corresponds to the construction of a rule of written law. But it is only a portion, and very far from the entire process. At the same time it is inextricably blended with the rest of the process. We cannot divide into two processes, that of ascertaining what the rule of law actually is, and that of determining whether the given case comes within it, but we must carry on the two operations together, simply because we lack any fixed standard by which to measure the contents of the rule of unwritten law, other than the general reasons by which we determine it to be a rule.[1] It is the existence of such a fixed standard, in the text or letter of the law, which distinguishes the written law from the unwritten, and enables us to divide (in the former case) the process of ascertaining what the law really is from the process of determining what facts are to be included under it; that is, of interpreting or construing it. All that is peculiar or characteristic in the science of legal hermeneutics, all that renders it either possible or useful to treat it as a separate branch of the law, depends on the existence of a certain *text*, a definite form of words embodying and formulating the law, such as we find in the written law and not elsewhere.

It may be worth while to remember that the process of construing written law is strictly analogous to a part of the process by which we ascertain and apply that which is unwritten; but for the sake of accurate thought it is more important to bear in mind that construction as well as interpretation — the entire doctrine of legal hermeneutics — is confined to the written law and presupposes a text.

An illustration of the practical difference between interpretation and application may be found in § 39 of this work, where the author, after speaking with just severity of the doctrine formerly held by the Star-Chamber, — that slanderous words admitted a double interpretation, and that a harsh interpretation might be put on words uttered by a commoner against a peer, while the same words uttered by a peer against a com-

[1] Jus commune, interpretatum a consuetudine, est idem quod ipsa consuetudo interpretans. Baldus, as quoted in Menoch. de Præsump., Lib. II., præf. 6, § 9.

moner would be mildly interpreted, — goes on to say: "Had the principle been that the same words used against some persons are more punishable than against others, the case would have been different." It is plain that the result in both cases — the punishment inflicted — may be the same; but who does not see the difference between stating it as a different interpretation of the words, and a different application of them to the circumstances?

NOTE D.

ON THE TERM "SOVEREIGNTY."

Many fallacies have been produced by the use of the term *sovereignty* in the vague and changing senses of which the author speaks in this passage (*ante*, p. 24). Even now it is constantly employed to connote two entirely different things, the connection of which is by no means necessary, but depends upon theories of law now very generally rejected. The sovereignty of a state, in its relation to other states, is of course equivalent to complete independence, — except when the term is used with reference to the relation of the States to the Federal Union, or to similar cases of divided sovereignty, with which we have nothing to do at present. Of course this sovereignty implies autonomy. The sovereign state makes its own laws, and is governed by them and them only. Nothing is law within its borders except that which is enforced as such by its own authority, and may therefore properly enough be considered as the expression of its individual and indivisible will. This may be called the external or international sense of the term.

But when it is inferred from this, that there must be within the state a definite indivisible power in which that relation to other states is embodied, and, so to speak, personified, we have altogether changed the meaning of the term, and the deductions which may be drawn from it. That there must necessarily be such a sovereign within the state, and that all its laws must derive their force and binding authority over the citizens from his will and sanction, may or may not be true, according to the theory we adopt; but it does not necessarily follow from the conception of sovereignty in the former sense. Yet we very frequently see the term employed as if this were the case, and as if all the reasons which make a state sover-

eign with respect to its neighbors were necessarily reasons for maintaining the existence or at least the fiction of a sovereign within the state. The theories by which the very essence of a law is made to consist in the command of a superior to an inferior, have been kept alive among us by the notion that a state could not be sovereign otherwise, more than by any other argument. It being assumed that sovereignty is an essential characteristic of the state, — which is true when sovereignty means independence, — it is inferred that there must be a sovereign to govern the state and impose laws upon subjects; which is entirely false in states constituted like ours. A reference to Mr. Austin's use of the term, in his well-known Lectures on Jurisprudence, will illustrate the fallacy better than any examples which could be quoted here, without exceeding the limits of a note; but it deserves mention that Judge Wilson, of Pennsylvania, who was himself one of the founders of our government, pointed out the fallacy of these theories, and the non-existence of sovereignty in their sense of the term, almost a century ago. See his Lectures on Law, Chaps. II. and V., in his works (Phil., 1804), Vol. I., especially pp. 60–99, 180, etc., where he denies the existence of sovereignty in this sense, and refutes the arguments of Blackstone (1 Comm. 43–51), Puffendorf (Law of Nature and Nations, Book VII., chap. 6, sec. 3), and Paley (2 Moral and Political Philosophy, 185) in its favor.

The following references may be found of interest, in connection with this topic: —

The sovereignty exists in the whole body of French citizens. It is inalienable and imprescriptible. No individual, no fraction of the people, can arrogate to themselves its exercise. Chap. I., Art. I., French Constitution of 1848, quoted at length in appendix to Dr. Lieber's Civil Liberty (3d ed., Phil., 1875).

The idea of undivided sovereignty leads to having no legislature, no division of power, — nothing but a succession of popular sultans. Lieber's C. L. 286.

What, in a philosophical sense, can truly be called sovereignty, can never be divided, and its division need not therefore be guarded against. Sovereignty is the self-sufficient source of all power, from which all specific powers are derived. It can dwell, therefore, according to the views of freemen, with society, — the nation only; but sovereignty is not absolutism. Lieber's C. L. 152.

Sovereignty and sovereign states. Woolsey's Political Science, Vol. I., p. 202.

Sovereignty. Lieber's Political Ethics, Vol. I., p. 216.

The distinguishing marks of sovereignty. Austin's Jurisprudence, Vol. I., p. 226.

Story on the Constitution, Vol. I., § 207.

NOTE E.

AUTHENTIC INTERPRETATION.

It seems doubtful if the conception of authentic interpretation was formed in the Roman law until after the period of the great classic jurists. We know from Justinian's own statement, that even in his time the power of the emperor to give to his interpretation of a prior law binding force was regarded as a doubtful question, until he himself decided that the doubt was absurd, and that the emperor's power to interpret the laws rested on the same base with his power to form law by judicial decision. Code, Lib. I., Tit. 14, 12.

In the nature of the case, there could hardly be authentic interpretation of any extent or importance while the legislative power existed only in such bodies as the Roman people or the Senate. To the jurisprudentes, who exercised the only office known as interpretation during the republic and early empire, any such claim as that of authentic interpretation would have been utterly absurd, and incongruous with their functions as they conceived them. It is to the changes which came over the Roman law during the third century of our era that we may trace the first rise of authentic interpretation. The law was no longer developed by magisterial edicts, and the rapid growth of absolute power left no place for its further development by a body of free jurists, even if such jurists had been there to continue the work of their great predecessors. The law had ceased to grow by any other method than by imperial constitutions. It had culminated in the perpetual edict and the works of the classic jurists, and henceforth the highest aim of Roman jurisprudence was to understand and apply the rules which they already possessed. Under such circumstances, the power of interpretation was too important not to be arrogated by him who possessed all power in the state beside; especially as the line between interpretation and the framing of new law had always been so completely disregarded by the earlier jurists. The first express assumption of the

power is found in a constitution of Constantine, addressed to one of the highest magistrates, — the prefectus urbi. It says, "the emperor alone has the prerogative of modifying the strict law by equitable interpretation."[1]

The emperor thus expressly reserves to himself the power previously exercised by the prætor and the jurists. We find declarations to the same effect repeated by Valentinian, Marcian, Leo, and Zeno.[2]

But in the legislation of Justinian this power of authentic interpretation first takes the form in which for thirteen centuries it has weighed upon and distorted the natural growth of human law. In a constitution of the year 529, addressed to the prætorian prefect, he asserts that every interpretation proceeding from the emperor has the perfect force of law, and he expressly forbids all interpretation by others. The power to interpret is distinctly based upon the power to legislate.[3]

Substantially the same rule was repeated four years later in the promulgation of the new Code. After forbidding all comments upon the Code, he ordains that if any doubt arise respecting the meaning of a law, the judges shall submit it for decision to the emperor, to whom alone it belongs alike to frame and to interpret the laws.[4]

The power thus arrogated by the emperor became an integral part of the Roman law, and has thus influenced the entire law of modern Christendom. It was perhaps the natural consequence of the relation in which the Roman law stood to its first mediæval interpreters that they should be led greatly to exaggerate the value and importance of authentic interpretation. The wisdom embodied in the Pandects and Code must have seemed then almost superhuman as compared with any laws or writings upon jurisprudence produced by their own contemporaries, or by the men of the intervening centuries. And as it was the fashion of the age to ascribe it all to Justinian, as a legislator in the strict sense of the word, and as their best means of interpretation unquestionably was by comparison of the different passages which they found sanctioned by his

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[1] Inter æquitatem jusque interpositam interpretationem nobis solis et oportet et licet inspicere. L. 1, C. de leg. (1., 14); also in L. 3, C. Th. de div. rescr. (1, 2). This passage relates to changes in the law, and not merely to equitable interpretation of a text, as clearly shown by Savigny. Sys., sec. 37, note *f*, and sec. 47, p. 300.

[2] L. 9, 4, 11, C. de leg. (1, 14).

[3] L. 12, C. de leg. (1, 14). The entire constitution is translated and commented on by Savigny. Sys., sec. 47, Vol. 1., pp. 301, 304.

[4] L. 2, § 21, C. de vet. jure enucl. (1, 17).

name, we can hardly wonder that interpretation by the lawgiver himself was regarded as not only possessing peculiar authority, but also as having a relative importance in the construction of a system of law which the experience of later ages has been very far from awarding to it. This was in harmony also with the theory of law then generally accepted: that the distinguishing mark, the specific difference, of all true law lay in its enactment by a sovereign.

But whether this be the true explanation or not, it is certain that with the Glossators, and their successors for some centuries, authentic interpretation had a place and rank peculiarly its own. They seized upon the passages in the C. J. C. by which its claims were recognized (such as cujus est jura præscribere illius etiam est eadem interpretari. L. 9, Cod. de legibus, I., 14; Novell. 143, præf. Legum interpretandarum omne principium et fundamentum in summa potestate constituendum est. L. 43, pr. Dig. de vulg. et pup. subst., XXVIII., 6), and gave them factitious weight by severance from their context. It was formally laid down that the interpretation of the law, and its application to actual cases, was in a special sense the office of the sovereign, and that whatever interpretation the magistrate or the jurist was allowed to apply could only be justified by supposing a delegation of that power to him. This delegated power of interpretation was further restricted by holding that the authority of a passage so construed by a magistrate or a teacher of law did not extend beyond the single case in which it was applied; while the interpretation of the sovereign became *law* as fully as the text that called for it, and was therefore binding on all inferior tribunals and persons, not only in its direct terms, but also in all the consequences and analogies which could be derived from it.

It is needless to dwell longer upon the development of the doctrine, or to show its adoption by the various states of modern Europe, or the manner in which it has been expanded and applied by modern civilians. Until within a century, there seems hardly to have been a doubt of its fitness and consistency. Indeed, with the theories of law generally accepted from the Middle Ages to the French Revolution, which, however much they might differ in other respects, agreed in holding that it was of the very essence of law to be prescribed by a sovereign, this could hardly be otherwise. It was not until Montesquieu made men familiar with the principle of the division of the powers of government into three great departments, that a basis was laid for a successful criticism.

"Accurately speaking, authentic interpretation is no interpretation, but rather additional legislation. We would distinctly exclude, however, *retrospective* authentic interpretation; for this amounts, indeed, to an application of the law by the legislature, and is incompatible with a true government of law."[1]

It may be worth while, however, to trace briefly the steps which led to the modern view of the doctrine in France. Prior to the Revolution, the king being the only legislator, the maxim "Ejus est interpretari legem, cujus est condere," was accepted without question. The ordinance of 1667 (Tit. 1, art. 7) expressly ordained that if in the higher courts any question arose respecting the interpretation of the king's laws, it was to be referred to the king himself. In 1790, when the power of legislation had been committed to an assembly, the statute of August 16th–24th (Tit. 2, art. 12) directed the judges to apply to the legislative body in all cases where they deemed necessary an interpretation of the law, or a new statute. That which established the Court of Cassation, of November 27th to December 17, 1790 (art. 21), provided that when any point came before the court for the third time upon error from the court below, the court, instead of emitting simply a judgment of cassation, should report the matter to the legislative body, which should then pass a declaratory resolution *(décret déclaratoire)*, which should be approved by the king, and should be the basis for all subsequent action of the court. Here we have, evidently, a new law authentically interpreting the former, and retrospective in its action. A similar provision was contained in the Constitution of September 3, 1791, but art. 256 ordered recourse to be had to the legislative body upon the first cassation. By the law of 18th Vindemiaire, of the year VI. (1797), a similar rule was applied to the Councils of Revision, which, in military matters, constituted a Court of Cassation. We find, however, in the law of 27th Ventose, of the year VIII. (1799), by which considerable changes were made in organization of the courts, that the aid of the legislative body was not to be invoked until the third time, — a provision being added, that on the second recurrence of the same point it should be heard in a joint session of all the chambers of the court. The law of September 16, 1807, transferred the power of authentic interpretation to the emperor in council. It also gave to the Court of Cassation the power to refer the matter to that body, before hearing the same point a second

[1] Lieber, Civil Liberty and Self-Government (3d ed., 1875), p. 208.

time, or to hear it in joint session, at its option; and required it to make such a reference before the third hearing. The law of July 30, 1828, introduced another change of some significance, by requiring the Court of Cassation, on the second hearing of the same point, to remit it to the lower court for judgment; after which the matter was to be reported to the king, that he might lay it before the legislative chambers, in the form of an interpretative act. Finally, in 1835, it was enacted that, upon the second decision of the same point by the Court of Cassation, the lower court should be bound to follow the law as laid down; and thus the necessity of authentic interpretation was entirely done away with.[1]

It should be added that nearly all these regulations, from 1667 down, were accompanied by express prohibitions to the judges to interpret the law themselves. The distinction made between the interpretation so forbidden, and that which is absolutely necessary in the administration of all justice, will be found in the following extracts from the discussion of the projét of the French Code: Le Ministre de la Justice dit "qu'il y a deux sortes d'interpretations, celle de législation et celle de doctrine; que cette dernière appartient essentiellement aux tribunaux; que la première est celle qui leur est interdite; que lorsqu'il est défendu aux juges d'interpreter, il est évident que c'est de l'*interpretation législative* qu'il s'agit. Il cite l'Art. VII., du titre 1er de l'ordonnance de 1667, qui défend aux juges d'interpreter les ordonnances."

Le C. Tronchet dit "que l'on a abusé, pour réduire les juges a un état purement passif, de la défense que leur avait faite l'assemblée constituante, d'interpreter les lois et de réglementer. Cette défense n'avait pour objet que d'empêcher les tribunaux d'exercer une partie du pouvoir législatif, comme l'avaient fait les anciennes cours, en fixant les sens des lois par des interprétations abstraites et générales, ou en les suppléant par des arrêts de réglement. Mais, pour éviter l'abus qu'on en a fait, il faut laisser au juge l'interpretation, sans laquelle il ne peut exercer son ministère. En effet, les contestations civiles portent sur les sens différents que chacune des parties prête a la loi; ce n'est donc pas par une loi nouvelle, mais par l'opinion du juge, que la cause doit être dé-

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[1] For the material of this sketch I am indebted to an article by M. Fœlix in the Kritische Zeitschrift für R. und G. des Auslandes. Band VII., p. 412. See also same volume, p. 484: "De la législation en matière d'intepretation des lois en France, par V. Foucher, avocat-général à Rennes. Paris. 1835."

cidée. On craint que les juges n'en abusent pour juger contre le texte de la loi; s'ils se le permittaient, le tribunal de cassation anéantisait leurs jugements."

Le C. Roederer dit "que l'Article IV. donne trop de pouvoir au juge, en l'obligeant de prononcer même dans le silence de la loi. Il appartient au juge d'appliquer la loi; il ne lui appartient pas de remplir les lacunes de la législation, quand la loi garde un silence absolu."

I have quoted this account of the French law of interpretation at some length, because it illustrates so clearly the course of modern thought upon the subject. In other states as well as France there has been the same tendency, unfavorable to the claims of authentic interpretation, — the same disposition to hold the two offices of making and applying the laws of the land entirely distinct from each other. It was a part of the same movement of thought by which the "divine right" of the sovereign to impose his will upon the subject as law has been devoided of all practical value, even where it has not been formally abandoned.

But there is another aspect of the doctrine, to which these remarks do not apply. The same distinction which has been noticed (*ante*, Note D) in reference to the meaning of the term "sovereignty," may be made here. The right of the legislator to interpret his own laws has a very different meaning when considered merely as between the legislators of an American or other modern state, and their "subjects," and when viewed with reference to foreign powers. The authentic interpretation of the state's own law is an indispensable part of its independence and autonomy. The sovereign state must interpret, as well as form, its own laws. The principle of authentic interpretation has, therefore, an application in the jurisprudence of the United States, its connection with which has been for the most part overlooked, but which will hardly be found, at least in so plain a form, elsewhere. It is evident that upon this principle rests the right of the State and Federal courts respectively to interpret their own constitutions and laws, and to require that otherwise independent tribunals shall follow such interpretation.

The fundamental rule of this kind of interpretation, so often quoted above, evidently applies as well between different legislative powers as between the legislator and his subjects. That each independent sovereign state must have, not only the right to frame its own laws, but also the exclusive faculty of expounding and interpreting them, of saying what they mean, is too plain to need any argument. That authentic interpre-

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tation has not been discussed in this external aspect, is only because, between states entirely independent of each other, the principle was too simple and devoid of exception to require discussion. But in the peculiar relation which the States of the American Union hold toward each other, and to the national government, it becomes a question of the greatest importance to determine from what source an authoritative interpretation of any constitution or law may be derived, and how far its authority extends. To point out that this question is really one of authentic interpretation, may be the means of turning to practical use in our own law some of the learning and ability displayed by many generations of civilians in treating of that subject, which is now passed over by most American lawyers and writers upon law, as of little or no present value.

The right of the United States Supreme Court to be the final interpreter of the Constitution, laws, and treaties of the Union is indeed so clearly defined by the Constitution itself, and the Judiciary Act (1 U. S. Stats. at Large, 83; 1 Bright. Dig. 259), that it would be mere pedantry to establish it by scientific discussion. The Judiciary Act (§ 34) also recognizes its obligation to follow the State laws, where they apply. But the similar right of the State courts to be the authentic interpreters of their own respective systems of law rests entirely on principle. There is not, and in the nature of the case can hardly be, any written law on the subject binding the courts of the Union, or of other States. When we reflect on all the consequences involved in, or even on the material interests affected and the sums of money transferred from party to party by, such decisions as those upon the currency, the validity of municipal bonds and railroad taxation, the power to regulate freight, etc., every aid must be welcomed in finding a clear and constant rule.

"The same reasons which require that the final decision upon all questions of national jurisdiction should be left to the national courts, will also hold the national courts bound to respect the decisions of the State courts upon all questions arising under the State constitutions and laws, where no question of national authority is involved, and to accept those decisions as correct, and to follow them whenever the same questions arise in the national courts." Cooley's Const. Lim., p. 13.

The construction given to the statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. Shelby *v.* Guy, 11 Wheat. 351, and other cases collected in Leffingwell *v.* Warren, 2 Black, 599, 603.

And the principles of authentic interpretation are so closely followed by this doctrine, that if the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, the United States court will follow the later adjudication instead of its own prior holding. United States *v.* Morrison, 4 Pet. 124; Green *v.* Neal's Lessee, 6 Pet. 291.

Other examples of the authentic interpretation of state courts, recognized by the Supreme Court of the United States, may be found in the following cases: —

Palmer *v.* Low, 98 U. S. 1: as to a rule of private property, and a State statute of limitations.

Orvis *v.* Powell, 98 U. S. 176: that the United States Circuit Court, sitting in Illinois, should follow the rule as to marshalling of mortgaged property for sale laid down in Iglehart *v.* Crane, 42 Ill. 261.

Slaughter *v.* Glenn, 98 U. S. 24: effect of a married woman's conveyance in Texas.

Arny *v.* Dubuque, 98 U. S. 470: the courts of the United States, in the absence of legislation by Congress upon the subject, recognize the statutes of limitations of the several states, and give the same construction and effect which are given by the local tribunals. Citing Leffingwell *v.* Warren, 2 Black, 599; Green *v.* Lessee of Neal, 6 Pet. 291; Harpending *v.* The Dutch Church, 16 Pet. 455; Davis *v.* Briggs, 97 U. S. 628.

That the United States courts are not bound by decisions of the state courts upon questions of general commercial law (even in cases arising within the same state where the decisions have been made), is the established doctrine of the Supreme Court; so much so that, in the last case where this doctrine was announced (Oates *v.* First National Bank of Montgomery, October term, 1879, 12 Ch. Leg. N. 119), it is said by Harlan, J., to be needless to cite more than the following leading cases upon the subject: Swift *v.* Tyson, 10 Pet. 1; Watson *v.* Tarpley, 18 How. 520; Carpenter *v.* Providence Ins. Co., 16 Pet. 511.

"But questions of private right, depending solely upon the common law, and not being questions of title to property, will be determined by the Federal tribunals on their view of the common law alone. Chicago *v.* Robbins, 2 Black, 418. And questions of general commercial law are not regarded as questions of local law, upon which the decisions of the State courts should be of binding force." Swift *v.* Tyson, 16 Pet. 1; Cooley's Const. Lim., p. 13, note.

NOTE F.

THE INTERPRETATIO OF THE ROMAN JURISTS.

In the Roman law, the term *interpretatio* had a much wider signification, and corresponded much more closely to the *construction* of our author than to his interpretation. A very large part of that law, as we find it in the Pandects and other writings of the Roman jurists, was formed by a gradual extension of the provisions of the Twelve Tables to the new cases arising from the extension of the civic law to new forms of life and emergencies of business. This was the work of the *jurisprudentes*, who strove by all possible means to make their innovations appear as mere applications of the venerated code which was still regarded as the basis of all civic law, — the trunk, to use Puchta's expression, from which all new law grew, in the shape of branches, twigs, and leaves. The following passage from that writer's Institutes describes with great exactness the process employed, — the *interpretatio duodecim tabularum :*[1] —

"The word *interpretatio* expresses the entire influence of the ancient lawyers upon the development of the law. This word usually expresses to our minds the act of determining the sense of any rule of law, and especially of a written rule, — of ascertaining the meaning of its author; and, consequently, when the term is used with reference to statutes, of ascertaining the intention of the legislator. But the *interpretatio* of the Roman jurists had no such merely receptive character. Its office was rather to supply the defects of the written law from the unwritten; to adapt the rules necessarily derived, as occasion arose, from the latter, to the provisions of the former. As 'interpreters' between the letter of the laws and the facts of actual life, they had not to adhere to the text of the former, and the original intention of the law-giver, but to modify these according to the demands of their time and the change of circumstances, and thus to make them applicable. Such interpretation must be governed by the spirit of the law, not by its letter, or by what the legislator actually had in view when he framed that letter; it consisted rather in a development of that spirit, a bringing out of the possible results, of which only the germs, so to speak, were to be found in the law itself."[2]

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[1] Pomponius, L. 2, §§ 5, 6, 38; D. de O. J., I., 2.

[2] Puchta, Cursus der Institutionen, Band I., § 78, s. 315, 316. So, Hugo, in his

But Vangerow differs from Puchta, in bringing even the process above described, of the Roman jurists, under the modern definition of interpretation, — using that word in its wider sense, so as to include what Lieber terms *construction*, — by defining it as the derivation of jural rules from a given law. Leitfaden, § 22, p. 33, Bd. I. This, of course, implies that the older limitation of the office of interpretation to obscure or doubtful laws, is incorrect. As to which, see Supplementary Note C, *ante*, p. 245.

The extent of meaning which the Romans gave to the term *interpretatio* may be seen, not only in their strictly judicial writings, but also in authors who use the term only in what we may accept as the received usage of the language, — as in the writings of Cicero and Quintilian. Thus, the latter tells us that the responses or opinions of the lawyers were entirely composed of two portions: one of which was the interpretation of words; the other was the discrimination of right and wrong.

At quæ consultorum responsis explicantur, aut in verborum interpretatione positum est, aut in recti pravique discrimine. Inst. Orat., Lib. XII., cap. 3.

And the influence which this broad acceptation of the word has had, down to the present century, is nowhere better shown than in the discussions upon the French Code. Sec. 5 of that Code stood as follows in the original draft: —

" The judges are forbidden to *interpret* the laws by a general disposition or rule."

Maleville informs us that in the discussions of the Conseil d'Etat the word *interpreter* was a stumbling-block to many, who denied to the judges the power of interpretation entirely, claiming that it belonged to the law-giver alone, according to C. ult., Cod. de Leg. (I., 14). To this it was replied, that there were two kinds of interpretation, legislative and doctrinal; that only the former was forbidden to the judges, while the latter was an essential part of their duty, which could not be fulfilled without it, in cases where the terms of the law are ambiguous. In spite of this reply, and especially on the ground that it might not always be easy to distinguish the two kinds of interpretation, the council determined to

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Geschichte der R. R., bis auf Justinian, s. 365, defines *interpretatio*, in this use of the term, as " not the explanation of obscure passages, but the gradual formation of legal doctrine."

avoid the dangerous term, and substituted for the original section that which now appears in the Code, viz.: —

Il est defendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises. Maleville, Analyse Raisonnée de la Discussion du Code Civil au Conseil d'Etat. Paris. 1807. Tom. I., p. 14.

The like influence of the Roman term upon the notion of interpretation in early English law has already been pointed out in Note B. It may indeed be said that the two historical sources from which all the contents of that notion have been drawn in all modern law, so far as Europe and America are concerned, are the *interpretatio* of the early Romans, and the "authentic interpretation" of the Middle Ages, derived to some extent from the later empire, of which some account has also been given in the preceding Note E. For this reason it is desirable to know what the former really was, — and especially to get rid of the erroneous impression conveyed by some recent statements, that it was peculiarly narrow and literal. There are some plausible arguments for this view, but they lie upon the surface, and are refuted by a careful study of the entire spirit and structure of that law. Ihering has shown this admirably in his brilliant work upon the "Spirit of the Roman Law," — a work which, paradoxical and extravagant as some of its views may appear, certainly opens new paths in the study not only of Roman but of universal law, and may hereafter be regarded as marking an epoch in that study. A translation of the author's Struggle for Law — Der Kampf ums Recht — has lately appeared in this country, where there has been little disposition to read foreign works upon law. It is much to be desired that it should lead the way to a translation of the larger and more important work.

The remainder of the present note is a condensed translation of Ihering's treatment of the subject, from Geist d. Rom. Rechts, Band II., Theil 2, pp. 427–455.

"A close adherence to the letter is a mark of unripeness everywhere, and especially so in law. The history of law might write over its first chapter, as a motto, "In the beginning was the word." To all rude peoples the word appears something mysterious, whether it be written or solemnly uttered as a formula, and their simple faith fills it with supernatural power. Nowhere was this faith in the word more powerful than in ancient Rome. The cultus of the word pervades all relations of public and private life, of religion, of morals, and of law. To the ancient Roman the word

is a power; it binds and looses; it has the power, if not to remove mountains, at least to remove crops into another field.[1]

With what rigid pedantry, therefore, the letter was treated by the ancient jurisprudentes, we might infer from the whole tone of national thought. There was a time, and a long one, when the same word-catching of the jurists, which afterwards furnished so happy a theme for the ridicule of a Cicero, and was gravely condemned by jurists and emperors, passed in the people's eyes as a proof of acuteness and superiority in the lawyer who employed it; and when, on the other hand, that freer interpretation which the later law employed, especially upon contracts of the jus gentium, would not only have failed to be understood, but would have met with the most decided opposition. It took many centuries to bring the law and the people alike to the capacity for this freer kind of interpretation.[2]

The supremacy of the letter in the older law comes to view in two aspects; or, in other words, there is a twofold restriction upon the will in the use of language: one is, that to a certain extent the choice of words is entirely forbidden, the binding force of some legal transactions being dependent on the use of certain technical words or traditional formulæ; the other, while leaving to the will the free choice of the language in which its acts shall be expressed, demands the most careful pains and watchfulness in their use, because the principle of literal interpretation treats nothing as said or intended, except what has been directly and expressly uttered. In the former case, we have a typical, abstract form; in the latter, an individual, concrete one; and we might, therefore, name them both formal limitations, and distinguish them as abstract and concrete, while embracing both under the rubric, formalism. But as this expression has already been employed in a different sense, and as there seems to be no need of a common expression for both cases, which, though flowing from the same spring, are entirely independent of each other, I pass this by. Formalism may exist without literal interpreta-

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[1] The Twelve Tables contained provisions against magical incantations of the kind. Pliny, H. N., Lib. XXVIII., 2, 4. The locus classicus upon the place is Lib. XXVIII., 3–5. Even down to the time of Apuleius, these magical formulas played a great part. See Metam. 1, p. 10; De Magia Oratio, II., p. 52.

[2] Gai. IV., § 30, Nimia subtilitas veterum; Constantine, in L. 1, Cod. de form. subl. (II., 58): Juris formulæ aucupatione syllabarum insidiantes; Cicero pro Cæcina, c. 23: Aucupia verborum et literarum tendiculas; de Off. I., c. 10, pro Murena, c. 11–13, de Orat. I., 55: Præce actionum, cantor formularum, anceps syllabarum.

tion, — as, for example, in a modern testament; and the latter without the former, — as, for example, in the interpretation of statutes.

The common source of both, I think, is subjective adherence to the external phenomenon; or, as it might be expressed in an American mind, the subjection of thought to external facts. Both are characterized by the preponderance of the external over the internal, of the form over the sense; but the mode of thought which answers to this objective fact, and in which, consequently, its history is to be read, lies in the direction of the mind to the external form, in the tendency of thought toward visible and tangible objects. The correctness of this view of formalism, as the source of literal interpretation, will be examined in the following consideration of the connection between word and thought: —

This relation, or the mode in which thought is expressed in language, may be regarded in a double aspect; and from this diversity spring the two kinds of juristic interpretation, commonly, but improperly, known as grammatical and logical. It sounds like a paradox to ask whether language can possibly reproduce thought; and yet this question may not only be asked, but answered in the negative. Thought is an internal process of the subjective life, an activity, a movement; but a movement cannot be objectified. Thought, therefore, cannot pass from the subjective mind into the external world, except at the price of losing its proper nature; that is to say, it becomes fixed or rigid. The spoken thought may be called frozen thinking.

I must recall here the expression of this thought by Schiller in his "Votive Tablets." "Why can the living spirit to the spirit not appear? Because, if the soul speaks, it is the soul no longer."

It is only in an improper sense, then, that we can speak of a transmission or imparting of thought. The thought itself is not imparted. The word gives only the occasion and possibility of a similar process of thought, — the reproduction of a like movement in the mind of the hearer, such as there was in the mind of the speaker. To speak is to produce motion, — a physical one in the air, a mental one in the auditor's mind. As no word rides upon the air-wave which strikes the hearer's ear, but it is only the vibration of the wave itself in which the word consists, so no thought is brought by the word to us as its mental freight, but the word only produces in us a corresponding movement of our mind. The word is not a gift, but, physically and morally alike, an influence upon another object. To produce this influence, and the very one which the author intends, a

glance, a gesture, a wink, is often as effectual as a word. This proves that the possibility of mental communication does not depend upon the objectifying of the thought; for what is objectified in such signs? And even when words are used, how far do they often come short of the thought, without in the least diminishing the truth and fulness of its reproduction in the hearer's mind! We impart thought by an impulse to similar thinking; and whether it be by words or by signs, the principle is the same. The one means may be better than the other; but they work in the same way, and both give, not the thought itself, but only the impulse and occasion to reconstruct the same thought. However exactly it may be formulated, it is no more the thought itself than the truest picture is the object itself.

In both cases, therefore, there does not suffice a mere passive attitude, a mere readiness to receive what is given. For what is given, here, is not that which forms the object of the gift, but is only the means by the right use of which the recipient may attain it. Action is therefore required upon the hearer's side; and here it is that grammatical and logical interpretation divide. The former does not make this active use of what is given. It remains passive in the receipt of the gift; it sticks to the letter, as language justly expresses it. It treats the words, therefore, as being what they never are, and cannot be: as being the thought itself in visible and objective form; or, what amounts to the same thing, as being the only permissible representative of it. On the other hand, the logical interpretation proceeds in conformity with the real nature of the process by which thought is imparted, and goes beyond the words; or, to use another very expressive mode of speech, it reads between the lines, — that is, it places itself in the mind of the speaker, and looks for his thought, as it were, at home. The scene of its activity is there, while that of the other is in the bare words. All that does not lie in the words themselves, but beyond them, in the speaker's mind, has no existence for the latter, because it has never been incorporated in language. It holds, as we say, to the dead word, — dead because reproducing, not the living thought, but only a mask or copy thereof. Its aim, therefore, must be to give the objective meaning the sense which the words have as measured by the usages of speech. Whether this corresponds to the speaker's real meaning, is a matter of indifference to it, and must be so for consistency's sake. This is its condemnation.

The two methods may then be designated, the one as objective and

absolute, the other as subjective and individual. The latter connects the language with its author, derives aid from all surrounding circumstances, determines what he in this particular case meant to say, and thus derives the force and meaning of the language, not from the words themselves, but from other sources. Its whole task may be comprehended in one expression, — to reproduce the situation in which the word was spoken or the sign made. In this situation — that is, in the relations of the persons to each other, in the purpose which brought them together, in the time and place of the meeting, etc. — lies the key, the commentary, of the external sign, and this determines the choice of means necessary to its comprehension. In one situation a word may mean more than a hundred in another. Hence in this sort of interpretation the same word or sentence may, in different situations, have entirely different senses. In the other mode this is impossible. Treating the word as something independent, unaffected by the character of the speaker and the surrounding circumstances, definable only from and through itself, it must always attribute the same meaning to the same word or sentence, no matter by whom, or under what circumstances, it is employed.

According to this, there can be no doubt of the respective value of the two methods. Logical interpretation alone accords with the true nature of mental communication. The function and value which it gives to the word are simply the true one. If the assumption with which grammatical interpretation starts — to wit, that thought could be reproduced, as such — were founded in truth, then this would clearly deserve the preference; for, to say nothing of the less demand made by it on the interpreter, it has the advantage of an immediate result, and thus of greater safety. It makes no demand for research and reasoning, as logical interpretation does, but it relies confidently on what lies directly before it and is plainly to be seen. But all its apparent advantage in certainty disappears when we find it to be often in the highest degree treacherous, untrustworthy, untrue, the word either too broad or too narrow for the thought, the certainty leading as often to error as to truth.

What we have said explains why grammatical interpretation has in history always preceded logical. Strange as it may seem, that language was always most strictly interpreted in those periods when men had least command of it, and consequently were least qualified to assure themselves of that correspondence between the word and thought, which is the basis of grammatical interpretation, still this reverence for the word harmonizes in

other respects with the character of such periods. Faith in external phenomena comes first, — is natural. Skepticism and emancipation from outward appearances come after. The word is apprehensible, immediate, — the meaning is invisible and mediate; and in language, as in all things, prehension precedes comprehension. Emancipation from the word, therefore, can only be looked for when the mind has attained the requisite strength to operate securely without it; but the Roman mind at the period of the older law had not yet attained this height. The law stood substantially in the stage of verbal interpretation.

When a mistake is made in the language of a contract, or any like instrument, the loss usually falls upon a single person and is temporary in its character, and in most instances that person is himself to blame for it; but when a legislator makes a mistake, it may harm not only an unlimited number of innocent parties, but the evil lasts as long as the law remains in force. It was probably for this reason, that the ancient jurisprudence remitted, in respect to statutes, something of the rigor with which it interpreted private instruments, although upon principle both are to be construed alike. The letter indeed plays a great part here, but its authority yields when it comes in conflict with the imperative needs of actual life. The examples of early interpretation that remain to us seem to deny this, and to bear the marks of unflinching adherence to the letter. Take, for example, the well-known passage of the Twelve Tables in regard to intestate succession. From almost every word of this passage has been developed an important rule of law, a rule of which the legislator himself had no thought, and which therefore finds its authority, not in his will, but in the letter alone. Take, first, the word *intestato*. From this it was inferred, that if one only of several devisees entered upon the inheritance under the will, the unclaimed portions did not, as might have been expected, lapse to the heirs, for by the statute these were to inherit only on condition that the ancestor died intestate; but he could not be said to die intestate, under whose will a single devisee claimed. Next, the word *moritur*. Upon this was based the requirement, that he who would take as heir must have existed at the moment of the ancestor's death, were it only in the womb. Again, *agnatus proximus*. By the latter words the succession of degrees was held excluded, as by the following, *si agnatus nec escit*, the succession of orders was excluded. Both phrases were taken in an absolute sense; that is, if a nearer agnate existed at the moment of the ancestor's death, all more remote agnates were excluded by him, even

though he died or refused the inheritance before entering upon it. The more remote were excluded, because at the moment of the ancestor's death they were not the *proximi* of whom the statute spoke. In like manner, the gentiles were not admitted in this case, because the statute provided for their admission only *si agnatus nec escit,* and the agnate existed, even though he subsequently died or disclaimed. This, indeed, was a masterpiece of literal interpretation; for, on a candid view, it is evident that the more remote heir is not absolutely excluded in such cases, but only for the benefit of the nearer one, and that consequently when the latter afterward disappears there is no reason why the more remote should not come in, since he has then become the nearer heir. If the same expressions were found in a modern statute, they could be interpreted relatively, holding him to be the next agnate who is excluded by none nearer, and the gentiles to be admissible whenever no agnate existed; that is, whenever none of them either could or would claim the inheritance.

The Lex Atilia ordered that whenever infants or unmarried women were without a tutor, they should be provided with a guardian by the authorities. No provision was made for the case when there was a tutor, but being insane or dumb, he was incapable of discharging his trust. In such a case, our modern lawyers would argue from the purpose of guardianship, as follows: It is the same when a guardian is entirely incapable, as when there is none at all; and the purpose of the statute being to supply the want of a guardian, it must apply alike in either case. The old law, on the other hand, adhered to the very language of the statute, *Mulieribus pupilisve non habentibus tutores.*[1] A person, it was said, whose guardian was insane, or otherwise incapable, certainly has a guardian, and therefore the case provided for by the statute does not arise. It required several decrees of the Senate to get rid of all the results of this doctrine. Dig., XXVI., 1, 17.

So, in the famous passage of the Twelve Tables, *Si pater filium venum duit filius a patre liber esto,* the older jurists limited its effect strictly to sons; while a later age would certainly have included daughters and grandchildren, according to the maxim, *Filii appellatione omnes liberos intelligimus.*[2]

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[1] Ulp., XI., 18. In Gaius, I., 185, and Inst. I., 20 pr., the language is, *Si cui nullus omnino tutor sit.*

[2] Dig. de V. S., L. 16, 84.

Although from these examples it might be inferred that the older jurists gave a strict literal interpretation to the laws, such an inference would be incorrect. It has never been formally made, though we find some of our best writers assume it. Some instances of a more liberal interpretation will show their mistake.

The Twelve Tables fix the period of *usucapion* at two years for a piece of land, and one for other things *(ceteræ res)*. What was the rule for a house? A strict literal interpretation would evidently place it among the other things, as Cicero happens to remark (Topica, Cap. IV.); but interpretation placed it justly under the same rule with the *fundus*.[1]

The right of the land-owner to gather fruits, etc., which had fallen upon his neighbor's lands, was derived from the Twelve Tables, where it was expressed in terms too narrow in some respects, and too wide in others, for it spoke only of glands, — that is to say, acorns, or fruit resembling acorns, such as chestnuts, — while it set no limit to the enjoyment of the right. By a literal interpretation, no fruits but acorns, and the like, could be thus gathered; but the gatherer might enter his neighbor's land at all hours and seasons — for instance, even by night — to gather them. A freer interpretation by the jurists extended the right to all its proper objects; while the prætor, employing the same power of construction, imposed reasonable limits upon its exercise.[2]

The law ordained that the slave, whose master had bequeathed him his person on the payment of a given sum, might pay this not only to the heir, but to any one who had purchased from him. By interpretation, the term "purchaser" was extended to mean any one who had acquired the ownership of the slave. In like manner, the expression *patronus* was extended to the children of the patron.[3]

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[1] This example illustrates very well the difficulty of distinguishing the province of interpretation proper from other parts of the law. In deciding that a house was subject to the same rule of *usucapion* with the land on which it stood, the jurists did not so much interpret the language of the law, as decide upon the nature of the object to which the law applied. No modern lawyer would think of placing a discussion of the question of fixtures under the rubric of an interpretation of the word *land;* and yet, in a very large number of cases, it is almost impossible to decide whether we have to determine the exact meaning of the words in which the law is framed, or the nature of the things which constitute the objects of the law; in other words, the boundary between interpretation and application of the law is very hard to draw. It may even be questioned whether, at the present day, any such boundary can be drawn. It is certain that we have no generally recognized test of the distinction.

[2] Dig. de glande legunda, XLIII., 28, pr. lex. 1.

[3] Frag. Vat., sec. 308; Coll., XVI., 8, sec. 2.

The words of the Twelve Tables upon which the action *aquæ pluviæ arcendæ* was based were, *Si aqua pluvia nocet*. It was held that the action lay, whether the harm had actually been done or was only threatened, as if the words were *nocere poterit*.[1]

If the law as to successions were strictly interpreted, the female sex would be excluded by the masculine form of *suus*, etc.; and even the right of the masculine *sui* might have been disputed, on the ground that the law did not expressly give it, but only took it for granted. So, from the words, *Si intestato moritur*, it might be inferred that the legal heirs were excluded whenever a testament was actually left, though the heirs named in it refused to take.

Upon testamentary inheritance, the Twelve Tables contain only the well-known clause, *Uti legassit super pecuniâ tutelâve suæ rei, ita jus esto*. If this were taken in its full extent, there could have been no question of *capitis deminutio* of the testator, no requirement of capacity in the heirs. These and other limitations were introduced into the letter by interpretation.

These examples prove abundantly that the ancient jurisprudents never adhered blindly to the letter, but constantly kept in view the reason of the case, and the needs of practical life, and knew how to interpret statutes in conformity with these. With all their reverence for the letter, the Romans had too sound sense to sacrifice to it their own convictions and practical interests, whenever the legislator had failed in expression. We may therefore assume that in the cases already mentioned, where the letter prevailed, the result was really intended, and the letter only used as a pretext therefor. For example, if testamentary and intestate succession had been held consistent with each other, there would have been no difficulty in reconciling therewith the *si intestato moritur*. The word *intestatus* was freely translated in other connections already mentioned. The inference from the word *moritur*, that the heir must be living at the instant of the ancestor's death, was only a pretext. The word could have been referred, not to the moment of the testator's death, but to that when the intestate succession opened, to meet the case of a disclaimer by the testamentary heirs. The exclusion of the *successio graduum* and *ordinum*, by the above

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[1] Dig., XL., 7, 21, pr. It is no doubt in imitation of this holding that, in a familiar case, it has been held in our law that an action would lie for damage by eaves-drip, even though the defendant could show that not a single drop of rain had fallen from the time of the erection complained of to the commencement of the suit. Fay *v.* Prentis, 1 C. B. 828.

cited words of the Twelve Tables, seems to have been prompted by a disposition to secure the benefits of the succession to the blood-relations *(cognati)* who were not mentioned at all in the law. At a later period, this disposition comes forth in the clearest manner, and forms one of the leading objects of the prætorian *bonorum possessio*.

To understand the singular interpretation of the *Lex Atilia*, we must remember that the Roman guardianship differed very widely from the modern. The latter exists entirely for the protection and interest of the ward; the former was also a right of the guardian. The *patria potestas*, no less than the *tutela*, was designed for the education and care of the persons subject to it; and if that, as being a right, was not lost by insanity, or other incapacity of the father to fulfil its duties; and if, in like case, the manus of the husband over his wife remained, so also must the rule be for guardianship; and we therefore are not obliged to attribute the rule above mentioned to a mere excess of literal interpretation. Neither is this proved by its later revocation, since the change was in harmony with an altered conception of a guardian's duties.

The law respecting the sale of a son, like that which excluded the *successio graduum*, was literally interpreted for the purpose of keeping it within the narrowest possible limits. The interpretation was, as we may say, one of tendency. That the father's right to sell the son was already disapproved by public opinion at the period of the Twelve Tables is shown by its limitation to three times. It was the same opinion that limited its exercise to sons, and emancipated daughters and grandchildren by a single sale. This is the clearest proof of the tendency. If it had been in the other direction, the interpretation would not have been that they were free by a single sale, but that, in respect to them, the father's power of sale had no limits.

Thus, it appears that the relation of the older jurisprudents to the statute was by no means a complete subjection to the letter, such as literal interpretation would have required, but may even be said to have been freer than we sometimes find it to-day; for, under the guise of interpretation, they often practised the construction of law, and twisted and turned it to the shape in which they wished to have it. That many of their interpretations were consistent neither with the words nor with the sense of the law, and that at times they even played upon the words, is too plain to be denied. The acceptance or rejection of an interpretation was determined, not by its correctness, either according to the letter, or accord-

ing to the intent, but by its practical utility. Or were the ancient jurists indeed so blind, that they could not see on what weak foundations many of their interpretations rested? They would not see; they tacitly agreed not to look at the grounds, where they saw the rule was necessary. Practical needs, considerations of jurisprudence, and others like these, entirely foreign to pure interpretation, — a conviction of the real value of the view they were to take, — influenced their judgment and quieted their conscience, however weak might be the external grounds. When it became a matter of policy to favor the retention of property in the male line, and probably even before the *lex Voconia* gave the example of abridging the right of females to succeed, the jurists discovered — *subtilitate quadam excogitata*, as Justinian expresses it — that the Twelve Tables had limited the right of women to inherit *ab intestato* to agnatic sisters. With what face could a jurist have said this, if he did not feel that his business was not so much to interpret the law as to modify it according to the interests and needs of the time? As these needs changed, so changed the interpretation. At one time, a *usucapio* of inheritance was necessary, and it existed; at another, it became needless, and disappeared; or, as Gaius says, it came to be held impossible. In short, the elder interpretation was essentially one of tendency.

But I regard it as rather a credit than a reproach to the older law that, instead of blindly following the letter, it sought to adapt this to the wants of life and the claims of the times. In this respect, it paved the way for the prætor's work. Both were active in the formation of law, not seldom at the cost of the letter, which, according to the narrow modern conception, it would have been their task merely to apply, or to provide the means of its application. But it was exactly this work that enabled them to judge of the actual value of positive law, its defects, its want of adaptation to the needs of the time, or its practical utility; and so long as sound sense and feeling remain in the persons charged with the administration of law, they will be the first to perceive such defects as these. Theory may condemn this ever so severely, and may impress ever so sharply upon the judge's mind, that his duty does not permit him to be influenced by his opinion of the merits or demerits of the law; this will not change the fact. No statute ever resisted, in the end, the unfavorable opinion of the profession. Whether he intend it or not, the judge's hand grows weak, the arm of justice loses its power, acute interpretation lends all its means to evade and to undermine such a statute, to introduce conditions not

found in the text, to extend or to contract its language, and, as it were, by a silent conspiracy, to invent and recommend the most forced constructions, till even the rules of logic bend to the claims of interest. This silent war of the profession against the positive law is repeated wherever that law becomes out of date without being formally repealed. It is in this manner that our instincts of right naturally react against the legislator's disregard of them. A recent example is furnished by the history of capital punishment. As the changed sentiment and opinion revolted against the severity of the earlier law, its interpreters became more ingenious in overcoming this severity, until one of them could even boast that he had not left a single letter of the statute standing. When such interpretations as we have mentioned above, and have called interpretations of tendency, are regarded apart from the motives that led to them, they seem so plainly untrue, so entirely untenable, that we wonder how they could ever have been accepted, or even seriously proposed.

But when the ancient interpretation is regarded from the right point of view, we see that what it produced was in substance fully justifiable, and even necessary, and that it would be altogether unjust to take in earnest Cicero's reproach against the older jurists, of having corrupted the law.[1]

The impulse to this alleged corruption proceeded not from them, but from the people; and if they had attempted to withstand it, it would have made its way by some other channel. Their artifices simply saved the necessity of legislation, which was employed only when the jurists found themselves unable to meet the need. Their interpretation deserves the name which the prætors acquired in a subsequent period, of *viva vox juris civilis*, — a living organ of the law, not a mere trumpet through which it was uttered. Though professing to be merely explanations, their interpretations, in fact, were a change and development of the law in accordance with the spirit of the time; and so they were regarded, at least later, when the old jurists were called *veteres qui tunc jura condiderunt*, and their work recognized as a distinct part of the law, — *jus civile* in the narrower sense, *compositum a prudentibus*.[2]

While fully recognizing that element of their work by which substantive

[1] Pro Murenâ, c. 12. He himself boasted afterward that this was said merely to influence the mob, — *apud imperitos dicta*, — or, as an English sergeant would have expressed it, to tickle the lay gents.

[2] Gai., IV., 30; Dig. de O. J., I., 2, 2, 5.

law was produced, we must at the same time notice as an essential feature of it (as the Romans themselves did), the mode in which it was formally connected with the older law. It seems as if jurisprudence did not then venture openly to display that creative energy which it always possesses in fact, and never employed more fully than in Rome itself, but was constantly striving to conceal it under a veil of positive law. If we could look more closely into their processes of development, we should doubtless find many more of the threads with which their doctrines were connected, however loosely, with the external letter.

I have left to the last one question which might properly have found place before, but could hardly be answered satisfactorily then. How did the ancient jurisprudence regard evasions of the law? In consistency with the principles of literal interpretation, it could hardly avoid tolerating them, either in respect to statutes or contracts; for the evasion of a statute implies no offence against the letter, but only against the intent, — that is, against an element which literal interpretation disregards altogether. We have but very little material for a direct answer to the question. We find, indeed, cases of evasion at a very early time, — as, of the laws against usury and those in regard to appeal.[1] But attempts at evasion occur in all ages. The only significant point is the mode in which they are regarded and treated by the law. As to that, these cases afford no definite information. We can only infer that the attempts were successful, and that the law did not avoid them entirely, as at a later day. In one case only, I think, we have clear and precise information, — differing, too, from what we might expect. Licinius Stolo, known as the author of the rogations which bore his name, had evaded his own land-law by emancipating his son, and conveying to him so much of his land as exceeded the amount allowed by statute. Livy tells us that he was convicted, under his own law, of committing a fraud upon it by the emancipation of his son.[2]

The testimony of the fact cannot be impeached, but we should not infer from this that such frauds upon the law were generally punished; for it was the people that condemned Licinius, and from what we know of the mode in which they exercised their criminal jurisdiction, we cannot reason with much confidence as to what an ordinary judge would have done. At any rate, we must consider, on the other side of the question, that of the

[1] Tacitus, An. VI., 16; Liv., II., 31; XXXV., 7; X., 9.

[2] Quod emancipando filium fraudem legi fecisset. Liv., VII., 16.

fictions of the older law not a few involved an evasion of the statutes, and that even the legislation often availed itself of an evasion to get rid of an earlier statute which it was unwilling directly to repeal. (The chief example of this is the *Lex Furia*, in regard to the amount of legacies.) Neither of these would have been possible, had the evasion of the law been regarded as it was by the later Roman jurists, or as it is in our own day. Probably in this case, as in others, the evasion of the law by a literal interpretation was considered justifiable; but a device could always be found, to exclude it from cases where it would be inconsistent with higher considerations.

NOTE G.

ON ANALOGY AND THE RATIO LEGIS.

The term *analogy* has been in use in this connection from the very beginning of the discussion, as will be seen by the quotations from Azo in Note B. It is mentioned by him as the last resort, when all other means of interpretation fail. Its employment to designate a distinct process of interpretation is of much later date, and has perhaps sprung from a hasty reading of Paley's very famous account of the process of legal reasoning, as a comparison of conflicting analogies. See Paley, Moral and Political Philosophy, Book VI., chap. 8.

The distinction made by Dr. Lieber, in the note on p. 46, *ante*, is based rather on the earlier view than the later. To warn us against an analogy drawn from "comparison of totally different things," while approving one of "subjects belonging to the same sphere," certainly implies that the merit or demerit of an analogy lies in the selection of the objects taken as analogies, and not in the conduct of the process. The treatment of the subject by Austin, on the other hand (Lectures on Jurisprudence, II., 1036–1055), is an attempt to reduce the analogy to a distinct kind of interpretation, or of reasoning in general. "In any of the meanings which we shall review below, the term *analogy* denotes an intellectual process, — a process which is caused or grounded by or upon an analogy. (1.) Analogy denotes the analogizing of several analogous objects; that is to say, the considering the several objects as connected by the analogy between them. (2.) Analogy denotes an inference, or a reasoning or argumentation, where-

of an analogy of objects is mainly the cause or ground." Austin, p. 1040. And in another place Austin divides analogy in a manner that would be absurd if it were not a distinct process, independent of the subject-matter or analogies reasoned from; since he distinguishes analogical reasoning concerning *contingent* matter from analogical reasoning concerning *necessary* matter. He does, indeed, "believe that the latter is not commonly called analogical reasoning, and it certainly differs essentially from analogical reasoning concerning contingent matter." *Ibid.* 1043. Without following his distinctions all through, I may be allowed to state as a conclusion, that analogical reasoning must *always* be contingent, *never* necessary, and that it differs from other reasoning only in the value of its premises, and not in that of its processes.

In reasoning from analogy, a conclusion is drawn from one instance to another, or from one species to another, it being assumed that in one of these cases we shall find the same generic rule that governs the other. The analogy is false if the instances or species are not of the same kind, or if, being of the same kind, the rule that is borrowed from one and applied to the other is not really the common rule or principle that governs both, but is peculiar to the former, constituting its specific difference instead of the common *genus*. For in that case we have not found a principle of union, but one of division. If analogy is regarded in its original meaning as proportion, as comparison of two qualitative relations, the above may be expressed by saying that the conclusion is sound only when both relations have the same exponent, — that is, when the two legal relations are of the same nature. Since analogy, as such, always proceeds from instance to instance, not connected by a clear and conclusive major premise, or, in other words, since analogy, while only analogy, assumes rather than finds the same exponent for both cases, it is inconclusive, and easily runs into vague fallacies, especially when, in the construction of a statute, a case brought under the law by one analogy is employed to bring in still another by a new analogy. Therefore, an argument from analogy should always be carefully tested or sustained by other methods. An exceptional case can of itself sustain no analogy, since the instance from which we reason — the analogon — must always be one which implies the rule.

Hence it may be seen how opposite parties will treat an argument from analogy. He who maintains it will lay stress upon whatever is common to the example and the case in hand, and will represent the desired conclusion as a logical consequence of this common principle. On the other hand, the

opponent will point out the differences, and deduce logically from these a denial of the same conclusion.

As an example of analogical reasoning upon a legal subject comprising several members, we may take the following from Cicero, Topica, c. 10: *Sunt enim similitudines, quæ ex pluribus collationibus perveniunt, quo volunt, hoc modo: Si tutor fidem præstare debet, si socius, si, cui mandaris, si, qui fiduciam acceperit: debet etiam procurator.*

Examples of the effect of analogy in the growth of law may be found in many civilian terms, such as *obligationes quasi ex contractu* (Institut. III., 28); *accusatio quasi publica* against the *tutor suspectus* (Institut. I., 26, 3); *pœna falsi* and *quasi falsi* (Dig. XLVIII., 10, 1, § 13); other cases will be found, Institut. II., 11, 6; III., 28, 6; IV., 5, etc. There are, moreover, many examples of growth by analogy in the same law, — *e.g.*, of the origin of the *actio utilis*, Dig. VII., 1, 17, § 3; *utilem actionem exemplo Aquiliæ*, Dig. XVII., 10, 1; Dig. XXXVII., 12, 1, etc. Examples of a doubtful analogy in Institut. II., 1, 33; compare 30. Also Dig. XVI., 1, 1; compare § 4. An analogical argument of Grotius *(De jure belli et pocis*, Lib. III., 6, 6, note *h)* has some historical importance. The French marine ordinances, for instance the one of 1543, declared that the neutral ship which bore the enemy's goods should be forfeited with them. Grotius limits this to the case where the ship-owner knew the hostile character of the goods, and adduces for this the following analogy from the Roman law (Dig. XXXIX., 4, 11, 2, Paulus): "If the ship-owner himself, or the freighters, have unlawfully placed any thing on board, the ship also is forfeited to the treasury; but if in the owner's absence that has been done by the master, or pilot, or boatswain, or any of the crew, these are punished in person, and with forfeiture of the goods, but the ship is restored to the owner." This analogy is incorrect, for there is a specific difference. The law treats of an offence against the statutes of a single state; the case in Grotius is one of the freedom of trade in international law.

False analogies are very frequent whenever rules are borrowed from foreign law, — as in the many cases where the legal names and terms of the civil law are imposed upon institutions of Germanic origin. See p. 239 *ante*, as to the cases of this kind in early English law. So it is a false political analogy by which, since Montesquieu's time, the English Constitution has been held up as a model for all states, without considering the difference made by historical circumstances. The logical mistake brings with it ethical injury to the indigenous constitution of the people

which is the subject of the mistake, interferes with the sound development of the native law, and prevents that law from being clearly understood by the people. Trendelenburg, Naturrecht auf dem Grunde der Ethik, § 73.

In Savigny's view, analogy is the method by which all deficiencies in the positive law are supplied in the absence of legislation. He thinks that all the differing views of jurists upon this subject may be reduced to two, — that which assumes a law of nature as the source from which these deficiencies in the positive law are to be supplied, and that by which the positive law, regarded as an organism, has the power of completing itself by this process of reasoning from analogy; and of these two views he regards the latter as the only true one. Its effect is produced, he says, in two methods: the first, when a new relation, previously unknown to the law, requires that the proper rules which govern it should be determined, and thus gives rise to an entire new doctrine, or, as the German jurists express it, to a new legal institution (recht-institut); the second, and more common, when a single new question arises in a doctrine already familiar. Such a question must be answered by the analogy of the rules already existing upon the same doctrine. (The strong resemblance of this view with Paley's "competition of opposite analogies" will be seen at once.) In either case, the analogy may point the way to the proper legislation on the subject, or it may guide a judge in determining the question as one of common law, — *i.e.*, will become an aid to interpretation.

The use of analogy always presupposes consistency in the law; not always, indeed, a complete logical connection, such as exists between cause and effect, but an organic harmony, resulting from the practical nature of legal relations and the objects for which the law exists. In reasoning analogically, we always start with a *datum* or premise which may be a rule of the positive law, or, more frequently, may itself be the result of theoretical reasoning. In all cases, however, says S., reasoning by analogy is essentially different from the process of extensive interpretation, with which it is often confounded. The object of the latter is not to supply a defect in the law, but to correct a mistake in the letter by the spirit of the law. In analogical reasoning, on the other hand, we assume that there is an actual omission in the sense of the law; and we aim to supply this by reasoning from the organic unity of the whole system. Therefore we must never reason analogically from exceptional cases, or privileges, or *jura singularia*. Even when the analogy of an anomalous or exceptional case is invoked, not for the purpose of extending the excep-

tion, but to decide a new and similar question, although this is a true instance of analogy, still the proceeding is improper. We ought rather to seek for that purpose an analogy from the general law; for all analogical reasoning rests simply on the internal harmony of the entire system of law. Anomalous rules grow out of other principles, and are merely interpolated into that system, and consequently cannot share in the organic power of development which the system possesses.

The Romans had very correct notions of the growth of law by analogy, though they did not always distinguish this process correctly from pure interpretation. L. 12, de Leg. (1, 3), "ad similia procedere;" L. 27 eod., "quæ quandoque similes erunt;" L. 32, p. eod., "quod proximum et consequens ei est;" L. 2, § 18, C. de vet. jure enucl. (1, 17), where Hadrian says the provisions of the edict shall be extended, — ad ejus [edicti] regulas ejusque conjecturas et imitationes.

This organic development of the law takes place chiefly in the form of fictions and *utiles actiones*. Gai. IV., §§ 10, 33–38. The harmony of the new with the old is thus assured, and the systematic unity of the entire law preserved. An example on a large scale is the *bonorum possessio*, which must be regarded throughout as a fictitious *hereditas*. Ulp. XXVIII., § 12; L. 2, de B. P. (37, 1), L. 117, de R. J. (50, 17).

Would it be too bold to say that all analogical reasoning depends on the imperfection of our knowledge, in this sense: that a wiser being, seeing more perfectly than we can the resemblances by which singulars are reduced to generals, and thus fitted to be the premises of a syllogism, would in every instance either see our analogy as an actual sameness of nature or of relations, and thus reason from it conclusively; or else would reject it altogether as a mistaken resemblance?

If this be so, the terms *analogical reasoning*, *analogical interpretation*, must be mistakes, and all attempts to define them failures. The single question as to the validity of any analogy would then be: is the resemblance between the terminus *a quo* and the terminus *ad quem* of our reasoning sufficient to warrant an assumption of a real connection between them, and inferences from that connection? If so, the analogy is a valid one, from which we may reason as from a proved *class*, though our results will always be contingent, because the premise is so. If not, the analogy is a deception, and the inferences from it must be simply misleading.

There is perhaps no phrase in our books capable of more important

applications, nor any which has led to more confusion and perplexity from misapplication, than that of *ratio legis*, — the reason of the law. It constitutes the essential part, or that which determines the sense, of two maxims in very constant use: *ubi eadem legis ratio, eadem legis dispositio*, and the still more common *cessante ratione legis, cessat lex ipsa*. It is evident that if the *ratio legis* could be determined with precision, so that these two maxims could be reasoned from with logical accuracy, they would furnish the basis, or major premise, for a large part of all the arguments made at the bar; at least of all those which, in the famous phrase of Paley, consist in the "competition of opposite analogies." Principles of Moral and Political Philosophy, Book VI., chap. 8, p. 493 (ed. Phila. 1794). For it is evident that the first step in the strife of these analogies must be to measure each of them separately with the case in hand, and to determine as accurately as possible the degree of likeness referred to in one of the maxims, or of unlikeness in the other.

The word "*cessante*," in the second maxim, is often understood as if it referred only to the question of time, and implied that a *reason* which had exactly covered the case previously had now, by a change of circumstances, ceased to do so. But this, though a possible application, is not the only or even the most important one. The cessation is evidently a logical, not a chronological, one. The reason ceases to apply, not because the law in question has grown old, but because in our mental processes we are receding from it. The law ceases to apply when we reach cases not covered by its reason.

The misconstruction just referred to seems to be closely connected with another, by which the reason of a law is confounded with the cause of it, — the *ratio legis* with the *occasio legis*. (The colloquial use of the English word *reason* favors the confusion.) Thus, to use a civilian example, the *occasio* of the *Senatusconsultum Macedonianum*, as we are expressly informed (Dig. XIV., 6, 1 pr.), was the usurious practices of a single individual; but its *ratio* is pointed out in the same passage, taken from the edict itself, in the words *ne cui, qui filio familias mutuam pecuniam dedisset, etiam post mortem parentis ejus, cujus in potestate fuisset, actio petitioque daretur*, etc.; and certainly no one, in this case, could ever make the blunder of supposing that the law was intended to cease with the death of the usurer to whose practices it owed its origin.

The history of the maxim throws some light on its meaning. It may be traced, like so many other maxims current in English law, to the Glossators.

being found in the gloss to Dig. XXXV., 1 (de conditionibus, etc.), l. 72, § 6. Papinian in the text says: *Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret;* to which the gloss adds: *Scilicet ut ea cessante, cesset legatum;* secus autem est in ratione legis, *nam ea cohæret in tantum ut*, ea cessante cesset lex. It is evidently framed on the model of another maxim, which occurs very frequently in the gloss: *causa cessante, cessat effectus;* and the qualification of the latter maxim, found in several passages, deserves notice in this connection. *Cessante causa cessat effectus* quando cessat causa finalis; secus quando cessat impulsiva. Glo. ad Dig. I., 7 (de adoptionibus), l. 13; glo. ad Dig. III., 1 (de postulando), l. 1, § 5. In the latter place the distinction is curiously illustrated. The text explains the law forbidding women to sue before the prætor, and assigns as its reason *(ratio)* that it would be contrary to the modesty of their sex and an assumption of masculine duties for them to appear in the causes of others. It then goes on to explain the occasion *(origo)* of the law from the well-known case of Calphurnia, a very vile woman, who acted so immodestly in bringing suits, and so annoyed the prætor, that women were thenceforth forbidden to plead. Upon which the glossator comments thus: "How then? if a good woman may by chance be found, shall she not be allowed to plead? It might seem so, for *cessante causa cessat quoque effectus*. But I say otherwise; for that maxim is true only of the *final* cause. But the impudence of Calphurnia was the *impelling* cause here; the final cause of the law was the preservation of modesty," etc. After this example, it can hardly be necessary to point out that in this distinction of final and impelling causes we have the exact counterpart of the distinction between the reason of the law, in its true sense, and the occasion of the law, pointed out above.

Yet Mr. Austin's criticism of this maxim seems to rest on precisely such a mistake. He thinks only of a case where the motive which impelled the legislature to enact a law has ceased to operate, and says with perfect truth that the statute does not lose its force.

"One of their [the civilians'] commonest rules of interpretation, *cessante ratione legis, cessat lex ipsa*, applies solely to precedents, and does not apply to statute law. For in statute law, the law is one thing, the reason another; the law, as a command, may continue to exist although its reason has ceased, and the law consequently ought to be abrogated; but there it is, the solemn and unchanged will of the legislator, which the judge should not take it upon himself to set aside, though he may think it

desirable that it should be altered. But in the case of judiciary law, if the ground of the decision has fallen away or ceased, the *ratio decidendi* being gone, there is no law left." Lectures on Jurisprudence, II., p. 652. The true doctrine of our law seems to be much better expressed by Mr. Fearne, in the following passage: —

"We have many laws the origin of which cannot at this distant period be traced at all, yet justly should we laugh at the man urging that as an argument against the present validity of such laws; and surely a law for which no reason at all now appears has no more original ground in the present state of things than a law whose origin may be traced up to a circumstance which does not now exist. * * * It is true, where those things which are the objects of any rule of law cease to exist, there the rule itself must of necessity cease, for want of subject-matter to relate to, or have any effect upon: but it by no means follows that where the same objects of a law still continue, that there the law should cease, only because the same state of things which was the first occasion of it no longer exists." Essay on Contingent Remainders, etc., pp. 59, 60, Chap. I., Sec. V., par. 17.

The distinction made by Mr. Austin between the effect of this rule upon statute and common law will be discussed in another place. At present, it is enough to say that in the broad and unqualified manner in which he states it, it can only be supported by the confusion of terms already pointed out. That a statute, as well as a decision, may be abrogated or deprived of force by the cessation of its reason, — the word being taken in its proper sense, — may be illustrated by a single example from Lord Coke. In the Third Institute, Chap. XXXV., speaking of the act forbidding congregations by Masons in their chapters (stat. 3 Hen. VI., c. 14), he says: "The cause wherefore this offence was made felony is for that the good course and effect of the statutes of Laborers were thereby violated and broken. Now, all the statutes concerning Laborers before this act, and whereunto this act doth refer, are repealed by the statute of 5 Eliz., c. 4, whereby the cause and end of the making of this act is taken away, and, consequently, this act is become of no force or effect; for *cessante ratione legis, cessat ipsa lex.*" p. 99.

Though the preamble of one act may appear to be directed against a particular evil, and though another act may be passed to aid in its application, the enactments of the second act are not necessarily to be confined to the special purpose which seemed to be the particular purpose that the

first had in view. Its own words must be considered as explaining and defining its objects and its means.[1]

NOTE II.

EQUITABLE INTERPRETATION.

The term of *equitable interpretation* has perhaps been used more vaguely and indefinitely than any other in the entire range of phrases pertaining to this topic. This has been especially true of English and American law, because in that system the meanings attached to the primary term "equity" have varied more widely than elsewhere. All that was fluctuating, and even capricious, in the civilian use of *æquitas* has been diligently applied by writers to the English word, and new sources of confusion have grown out of applications unknown to any other jurisprudence.

In order to fix as exactly as possible the true meaning of the principal phrase, it is necessary to dwell for a moment upon that from which it is formed, though we need not speculate, as Mr. Austin and others have done, upon its etymology. Lectures on Jurisprudence, p. 596.

The notion of equity is determined, not so much by the derivation of the word itself — for we find the same notion very clearly apparent to Aristotle in the Greek term ἐπιείκεια — as by the notion with which it is compared, that of law. The true relation of the two is well expressed by the familiar maxim that equity is the correction of law, where that is deficient by reason of its generality. This does not mean, as it is too often misunderstood, that equity is a distinct and separate jurisdiction, interfering to review or enjoin the decision of the stricter tribunal in hard cases. The maxim was formed long before such a distinct jurisdiction was dreamed of; and this misapplication of it is only one of the numerous mistakes into which modern writers have been led by a confusion as to the history of the term, of which we shall speak below. The "generality" meant in the maxim belongs to law, as law, — as a fixed and prescribed rule, — no matter how or where it may originate: to the law laid down by a precedent of a modern court of chancery, no less than to that adjudicated by a court of common

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[1] Copland *v.* Davies, L. R. 5 H. L. 358 (1872); 2 Moak, 38.

law; to the law formulated by both, no less than to that enacted by the lawgiver. It is of the very essence of any such rule of law that its command should be expressed in general terms. It must describe human acts by classes, and prescribe the consequences of each according to the general class to which it belongs, and not according to the peculiar circumstances of each act. The circumstances under which one man may take another's life are innumerable, and there may be as many differing degrees of moral blame attendant upon them; but the law groups them all under the four categories of murder, manslaughter, excusable and justifiable homicide. If A. claims a civil right against B. under a certain rule of law, he must show himself entitled to it by certain marks which the law itself prescribes, disregarding a multitude of other marks equally present in the transaction between them. All the certainty of law, and its very existence as a prescribed rule, depend on this regulation of the sequence of actions by selected marks, and its disregard of all other circumstances, causes, motives, etc., which have contributed to the existence of each action.

But while this is so in theory, it does not follow that justice is always dispensed among men upon such exact and foreordained rules. Human wisdom could not frame a system of laws that human nature could endure, if every action were thus rigidly adjudged in advance. There must be some flexibility, some power to consider results and motives, some discretion in the substitution of one mark for another. It may exist in the form of a pardoning or dispensing power; in that of judicial discretion as to the judgment to be pronounced on given facts; in the committal of certain sequences to a jury, or other tribunal, to be determined as "questions of fact;" in actions "upon the case;" in a jurisdiction formally equitable, or in equitable interpretation of the letter of a statute. In all these cases alike, the rigor of the law will be found to be modified by the same method. The exact sequence of acts prescribed by the law will be set aside in favor of one more consistent with the demands of justice or morality, upon a view of all the circumstances of the individual case. The process will always be a specializing one. And it is this process of drawing a conclusion from the special facts of the case, outside of or in addition to the marks prescribed by the general law, that we call equity, in all its varying forms.

It would be an interesting task, if space permitted, to show the truth of the remark that all the proceedings mentioned above are essentially equitable in their nature. It must suffice here to refer to the *actiones in factum* and *ex æquo et bono* of the Roman law, and to the recognized equitable

character of the "actions upon the case" of our own. This is more clearly pointed out in Cowell's Institutes than in any other work I remember. To the same effect is the well-known *dictum* that the verdict of a jury on a question of fact is always bound by no law in the world but that of their own consciences (Kendall *v.* John, Fost. 117); and the result will be the same if we compare with the above account of equity the distinction of law and fact as expressed by Biener (Geschw. Gericht, III., 133), explaining the maxim that the judges answer to the law, the jury to the facts.

"This maxim has the practical consequence, that all for which a general rule valid in all cases can be found, belongs to the judge, or the jury must at least be instructed therein by him; while on the other hand, that which cannot be subjected to any general rule, but is to be judged by the circumstances of the individual case, is left to the decision of the jury."

"The idea of an authority vested in the judges to disregard the letter of a statute in order, in a given case, to attain the ends of justice, is familiar to the authors of the civil law; and by them this vague and undefined power is called *æquitas*. (Puffendorf, Elem. Jur. Univ., I., def. 13, § 22.) This idea of a natural equity to be observed in the construction of a statute runs through all the great authors of the civil law. From the civil the maxim was imported into the common law. [Citing Lord Coke, as below.] And the proposition that in construing a statute the judges have a right to decide in some cases even in direct contravention of its language, has been repeatedly asserted and practised upon by the highest authority." Sedgw. on Stat. & Const. Law, 296, 297 (citing to last remark, Margate Pier Co. *v.* Hannam, 3 Barn. & Ald. 266; Canal Co. *v.* Railroad Co., 4 Gill & J. 152; Brown *v.* Somerville, 8 Md. 444, 456; Bac. Abr., tit. "Statute," I.; Jackson *v.* Collins, 3 Cow. 89, 96; The People *v.* Utica Ins. Co., 15 Johns. 358, 380, 381).

Hence arose in our law the common phrase, "equity of a statute," as in the following passage from Littleton: —

"And all these entailes aforesaid be specified in the said statute of Westm. 2. Also there be divers other estates in taile, *though they be not by expresse words specified* in the said statute, but they are taken [*i.e.*, included or governed] *by the equitie of the same statute*." Lit., § 21. In his note to which, Lord Coke gives the following excellent definition: "Equitie is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischiefe, or cause of the making

of the same, shall be within the same remedie that the statute provideth; and the reason hereof is that for the law-makers could not set downe all cases in expresse terms: Æquitas est convenientia rerum quæ cuncta coæquiparat, et quæ in paribus rationibus paria jura et judicia desiderat." 1 Inst. 246. And see, for illustrations, Com. Dig., tit. "Parliament," R. 13 to R. 20.

If we examine the cases collected by Comyns, to which I have just given a reference, it will be seen that this kind of equity in construing statutes is employed just as freely, and perhaps still more often, by the common-law courts than by chancery and other equity tribunals, and that the rules which govern it are the same in both jurisdictions. This, of itself, will be sufficient to prove that it is an entirely different thing from *equity* as a form of jurisdiction, and that no one would probably have confounded them together, if it had not been for the fact that the same word was used to designate both.

Yet plain as the fallacy seems to us now, it is certain that some great lawyers have been deceived by it. Among these must be reckoned Blackstone himself, at least in certain passages of his first volume (pp. 61, 92), where he gives a very good account of the *equity* applied to the interpretation of a statute, but seems to regard it as the same thing with the equity of the courts. Yet when he subsequently comes to treat of the latter, — that is, of *courts of equity*, — he describes the former so correctly that it is evident the confusion was rather in his language than in his thought.

"It is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound and equally profess to interpret statutes according to the true intent of the legislature. In general law, all cases cannot be foreseen, or, if foreseen, cannot be expressed; some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases thus out of the letter are often said to be within the equity of an act of Parliament; and so cases within the letter are frequently out of the equity. *Here by equity we mean nothing* but the sound interpretation of the law, though the words of the law itself may be too general, too special, or otherwise inaccurate and defective. These, then, are the cases which, as Grotius says, 'lex non exacte definit, sed arbitrio viri boni

permittit,' in order to find out the true sense and meaning of the lawgiver from every other topic of construction. *But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity. The construction must in both be the same;* or if they differ, it is only as one court of law may also happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single tittle." 3 Bla. Comm. 431. See also Story's Eq. Jur., § 7.

It should be added that the results of the ambiguity have not been confined altogether to confusion of thought. There is a large class of cases in which courts of equity, especially during the seventeenth century, carried their power so far as to override the express words of statutes, where in the particular case these words appeared to them to work hardship or inconvenience (Sedgwick, p. 363); and although "this power in regard to statutes is now looked on with distrust, and courts of equity endeavor to adhere to the much more logical rule that equity follows the law, yet the effect remains in certain methods of interpretation peculiar to equity, especially with regard to a few important statutes, like those of *frauds*, of *registry*, and of *limitations*. But the importance of these is greatly diminished with us in America, since these statutes are nearly all reworded, and are therefore to be construed anew, the old peculiarities of the English system being either approved by adoption into the statute itself, or rejected. For illustration see Story, § 753 *et seq.*, on parol agreements for sale of lands." Sedgwick, pp. 362, 363.

"It is also important to remark that the rule [of equitable construction of a statute] has been applied more freely to the ancient statutes than it now is to those of more modern date, which are interpreted somewhat more strictly, and with closer adherence to the letter. For the style of framing acts of Parliament has itself undergone a material change, — those of a more ancient era being comparatively short, and general in their character, while the later acts are expanded into minute detail, and intended to reach every specific case; and therefore, in adopting a construction not in strict conformity with the language of the legislature, there is more danger than there once was of going beyond, or falling short of its real intention." 1 Stephen's Comm. 77 (citing Rex *v.* Gardner, 6 Ad. & E. 118, *per* Coleridge, J.; Brandling *v.* Barrington, 6 Barn. & Cress. 475; Rex *v.* Inhabitants of Barham, 8 Barn. & Cress. 104; Notley *v.* Buck, 8 Barn. & Cress. 164; Adam *v.* Inhabitants of Bristol, 2 Ad. & E. 395, 399).

It is evident that in the brief history of American legislation there is no contrast in the early and late forms of law such as that referred to above; our oldest are much more precise, our latest much less so, than theirs of same age.

It may be worth while to point out a sentence of Mr. Sedgwick's very able work, that might give a false impression, and which may serve as a very good illustration of the method by which our law is confused by incautious statements on such matters.

"This doctrine [of the equitable interpretation of statutes] grew out of the peculiar ideas that were engendered in the minds of the English lawyers by the double organization of the tribunals of justice: while the common-law courts sat to administer the strict rules of law, the courts of equity arrogated to themselves the duty of doing justice on a more enlarged and liberal scale, and in the early days of their organization carried their power so far as to override the express words of statutes where, in the particular case, it appeared to them to work hardship or inconvenience." Sedgwick, pp. 362, 363.

A reader would certainly infer from this, that this meaning of *equity* grew out of the use of the power by the courts of that name; whereas the exact converse is more nearly true: the courts were first called courts of equity because they assumed a power which had for ages been known by that name. That Sedgwick understood this is shown (pp. 296, 297), where he describes clearly the use of the term in the civil law, and its adoption therefrom. But so much confusion has been wrought by the application to chancery jurisdiction of phrases descriptive only of the civilian's *æquitas*, that it is worth while to detect the fallacy where we can clearly show it at work.

Nothing could be easier to show than that this sense of equity was familiar to the English lawyers for centuries before that term was first used to denote the extraordinary jurisdiction of the chancellor. The word is found in the Anglo-Saxon coronation-oath; in Glanville, and all the treatises that followed; in the Year Books, and in Plowden, and always in the sense above explained. Plowden's use of it is worth noting, not merely because it is so frequent in his pages, but because when he wrote, that jurisdiction of the chancellor, with which the name of equity is now so constantly associated in the minds of English lawyers, had been in full force for at least two centuries. Yet Plowden never mentions it by that name.

In the case of Eyston *v.* Studde, Plow. 459–468, the last four pages

(of the folio edition, 465–468) are occupied with a note by the reporter, addressed to the reader, giving a full account of equity, as he understood it, both in its restrictive and its enlarging effect, with many illustrations. (He even applies it to penal statutes, contrary to the modern doctrine. Plow. 468.) See also Stradling *v.* Morgan, Plow. 199–204. For an example from the Year Books, see 4° Ed. IV., p. 8., fol. 8, "Per l'equité le stat. de Marlbridge." Lord Keeper Egerton ordered a vexatious plaintiff, *in forma pauperis*, to be whipped upon the equity of the statute 23 Hen. VIII., c. 15. Spence, Eq. Jur. of the Court of Chancery, I., p. 690, note *e*.

NOTE I.

ON THE VALUE OF FORMAL RULES OF INTERPRETATION.

The rules of interpretation and construction which Dr. Lieber has given at the end of the fourth and fifth chapters of this work, and in § VIII. of the sixth chapter (see pp. 108, 109, 136, 137, and 158–165, *ante*), are probably more familiar to the present generation of American lawyers than any other part of his work; perhaps more so than any part of any other work on the same subject. They have been repeatedly copied, in whole or in part, by other writers, and have been frequently quoted by judges in their decisions of questions to which they are pertinent. They have given an appearance of learning and a tone of exact argument to many disquisitions in which their authorship was not hinted at. Dr. Lieber's volume has so long been out of print — since a very brief period after the edition of 1839 — that many of those who have long been familiar with the rules will learn now for the first time to whom they were indebted for their introduction to American law. Their succinct form and clear and simple style have impressed them on the memory of students, wherever they might be found, and thus have given them a vitality which has not been shared by the more extended discussions of which, in Dr. Lieber's own pages, they form only the conclusions. Most of them, undoubtedly, have a special value in helping to fix in a student's mind the principal points and topics of the process of interpretation, and thus aiding to train his judgment in applying to particular questions that great mass of general knowledge

which is always taken for granted in an opinion of any value upon the construction of a difficult statute or contract, or even upon the meaning of a single word. For even the meaning of a single word must always be determined, in the last resort, by considering the whole class of things or notions to which it belongs. There is no scientific process by which we can extract that meaning from the word, considered alone, without reference to its usage by the whole community, through a greater or less period of time, and to the usage of other words by which it is bounded on every side. Our knowledge of this is usually taken for granted, not expressed, in discussing its interpretation, but it is none the less an essential prerequisite of the process. And the chief value of the rules above referred to seems to be, in most cases, not that they enable us to dispense with this general knowledge, and decide the question upon a single consideration, but that they eliminate, so to speak, certain factors from the problem, and thus reduce the remainder to more manageable proportions.

Upon a comparison of the three series of rules, it will be seen that some of them are repeated literally, while others appear under slightly different forms, but with substantially the same meaning. The whole number may also be arranged in a few groups of cognate import. Thus, a small number of rules relate to the meaning of words, taken apart from the context. In connection with these, I would ask the reader's attention to the editor's note 19, on page 106. The longer I study the subject, the more I am impressed with the truth that the sentence or phrase is usually the unit of interpretation, and that false constructions oftener grow out of the attempt to decide a difficult question by the meaning of a single word, taken by itself, than from any other cause.

A larger group, about a dozen in all, may be formed of the maxims which contain the general principles of interpretation. The fundamental rule here is well stated on page 109: "There can be no sound interpretation without good faith and common sense." By these two terms the author evidently intends to cover that very large part of the entire process which cannot be reduced to more formal rules. Good faith is the moral prerequisite in all interpretation, as it is in every other question of law. No display of critical ingenuity, no hollow pretence of conformity to established rules, can make an interpretation acceptable, if it evidently proceeds from any other motive than an honest desire to learn the true meaning of the text in question. And to the average mind this element of good faith, or the lack of it, in a given case, will be more easily appreciated than any other quality. The grounds upon which the judgment is based

may be, and in most cases probably will be, too broad and various for explicit statement, but the result will be no less sure and decisive on that account. It will rank with those judgments which we commonly call *intuitive*, because the mental processes that lead to them are too deep for ordinary analysis. By "common sense" Dr. Lieber no doubt meant the intellectual, as by "good faith" the moral, prerequisites of interpretation. He includes under the term that fund of general knowledge which has been mentioned above as taken for granted in the application of all these rules. Truth is always consistent with itself on all sides; the best test of a true interpretation usually is, that it agrees at all points with the common fund of knowledge. To use a phrase that has become very popular and well understood in natural science, it is in harmony with its environment. This harmony cannot be reduced to any formal rules, because the possible points of contact between any one truth and the rest of human knowledge are numberless. But it is easily perceived, or rather felt, by a sound mind; and it will be decisive for or against a proposed interpretation, even though all the rules that may be formulated array themselves on the opposite side. Thus, Blackstone says that "when one signification of a word induces an injustice or absurdity, another is to be taken, even where the unjust or absurd signification is the primary or proper one." Law Tracts, I., 24.

A third group may be formed of the rules which determine the comparative force of different modes of expression, and the results of real or seeming conflicts between different statements on the same subject. There are fifteen of these in the three series, although Dr. Lieber has wisely rejected by far the larger number of such rules occurring in the older writers on Interpretation. The pedantic minuteness and precision to which I have referred in a previous note (B), as characteristic of the fourteenth and following centuries, displayed itself more fully in this part of the subject than any other, as the reader may readily see for himself in the pages of Menochius or Barbosa. It would be unjust to condemn their labors as utterly worthless, although we now disregard their technical rules, and interpret freely by good faith and common sense where they labored painfully over their distinctions. The English lawyers had some traces of the same method, as in the "certainty to a common intent, and certainty to a certain intent in general, and certainty to a certain intent in every particular" of the old rules of pleading. 1 Chitty's Pleading, 213. Every thoughtful practitioner of the present day must see that it was the

slow and laborious construction of the common law, by such a procedure, which rendered possible the free and equitable practice of our codes and improved practice acts. We could hardly judge of equities at all, or state legal rights or wrongs in precise language, "intelligible to a person of ordinary understanding," as our codes require, if our legal terms and conceptions had not been fashioned to our hands by centuries of a more strict and technical jurisprudence. The same order of development seems to govern in all abstract sciences. Man begins with narrow, strict, technical rules, formal language, arbitrary definitions; and it is only by centuries of labor with these that he gradually learns to dispense with them, as clumsy tools, to use abstract ideas with some degree of freedom, to weigh and compare them directly, and to form, upon general considerations, judgments that will commend themselves at once to the reason and conscience of the community. The modern freedom of interpretation, appealing for the validity of its results directly to "good faith" and "common sense," owes its accuracy and safety of judgment to the narrow and technical process of thought which it has now outgrown. And we may infer from this the proper use and value of such formal rules as are still approved. The individual student will find them great helps in the formation of his judgment. Even to the matured mind they will often prove of service in formulating the question that is to be decided. But they will rarely give a safe and decisive answer, taken alone. The weight of "common sense" upon a question of interpretation so far preponderates now over all other considerations embraced in these formal rules, that even their combined force (if they all could be combined in a single instance) would not avail against it.

The fourth and last group comprises the rules which relate to the purpose and object of interpretation or construction, in any given case. They may be regarded as specialized expressions of what we mean by "good faith and common sense" in particular cases, and need not, therefore, be commented on at length, after what has been said already of these two great principles of interpretation. Like all special statements, they are instructive and helpful in attaining a clear conception of the general term of which they form part, but must be carefully held subordinate to it.

The following table of the maxims given in the text is arranged to show the groups spoken of in this note. It will be of use also in comparing the contents of the three series, rule by rule, so as to make them illustrate each other. I have tried to place each rule in the group to which it most

properly seemed to belong. It must be remembered, however, that the boundaries of such groups can never be precise, and that some of the rules have more than a single object or application. To another mind, they would very possibly assume different relations, and be differently arranged: —

Class.	Page 108.	Page 136.	Page 158, etc.
1. Words	Rules 1, 3,	13,	1, 3, 4, 5.
2. Principles	Rules 2, 9, 7,	1, 9, 11, 12, 15, 16,	2, 12, 13.
3. Comparative rules . .	Rules 4, 5, 6, 8,	6, 7, 8, 11, 14,	3, 10, 15, 16, 17, 18.
4. Purpose and object .	. . . . . .	Rules 3, 4, 5, 9, 10, 2,	6, 7, 8, 9, 10, 11, 14.

NOTE J.

ON THE INTERPRETATION OF CRIMINAL LAW.

The maxims that in penal cases every interpetation should be favorable to the accused, and that penalties may be mitigated but not enhanced by interpretation, are taken from the Pandects.

Hermogenianus. Interpretatione legum pœnæ molliendæ sunt potius quam asperandæ. L. 42, D. de pœnis, XLVIII., 19.

Paulus. In pœnalibus causis benignius interpretandum est. L. 155, § 2; D. de R. J., L. 17.

Adopted in almost the same words by the Canon Law. C. 15, dis. 1, de pœnit; c. 49, de reg. jur. in 6to (Boehmer's ed., Vol. I., p. 49, and Vol. II., p. 1039).

From this source they have been derived into the law of modern Europe, English as well as Continental; though it is only within the last century that their spirit can be said to have been faithfully followed.

The doctrine that no act can be punished as a crime, unless it has previously been recognized as such by the positive law of the state, is logically connected with the foregoing, and is therefore often spoken of as having the same origin, but in fact has a very different history. Its basis deserves a particular examination, because it has already been applied in some of our states, and in the Federal courts, in a form requiring an express statutory provision to warrant the conviction for any crime, and of course doing away with common-law crimes altogether. And these instances, from

being exceptional, are evidently on the increase, and almost certain to constitute, sooner or later, the general rule; for it commends itself particularly to the sense of justice of our people, and their desire of security, that no man should incur criminal punishment for an act not expressly and in terms forbidden by the law. It is the logical continuation of the same feeling which overthrew the Star-Chamber, and made its very name, as a court of criminal equity, synonymous with iniquity and oppression.

The maxim is found in all the civilian collections, under the following forms, or something resembling them: Nulla pœna sine lege (Fromelt, Regulæ Juris, 107); nulla pœna sine lege, nulla pœna sine crimine, nullum crimen sine pœna legali. No authority, however, is cited for the maxim, either there or in the various treatises in which it is cited, — *e.g.*, Feuerbach, Lehrbuch des peinlichen Rechts. (13th ed., by Mittermaier), sec. 2, note II.

The Canon Law, while very careful to limit the power of inflicting a penalty to the lawful judge (c. 4, C. 33, qu. 2, Boehmer's ed., I., 990), nowhere recognizes any such law.

Wilfrid, bishop of York, having gone to Rome to be tried by the Pope, Agatho, was "acquitted of everything, whether specified against him or not." Bede, Eccl. Hist., Lib. V., c. 19.

So an absolution was granted in 1383 to Crusaders "from all the sins which thou dost with a contrite heart confess, or wouldst confess if thou didst remember them!" Parliamentary History, Vol. I., p. 316.

Its first appearance in statutory law, so far as I have been able to find, is in the criminal code of the Emperor Joseph II. of Germany, promulgated January 15, 1787, the first section of which is as follows: "Every action contrary to law is not a criminal offence, or a capital crime; and no action contrary to law shall be considered as criminal, but such as shall have been determined to be so by the present criminal code." The Emperor's New Code of Criminal Laws. Translated by an officer. Dublin: 1787.

A similar provision is found in the Preuss. Land-recht, Thl. II., tit. 20, art. 9, and in the legislation of Bavaria, Saxony, and Wurtemberg, at the beginning of each code. It was adopted by Napoleon in the Code Penale of 1810, Art. IV., in the following terms: "Nulle contravention, nul délit, nul crime ne peuvent être punis de peines, qui n'etaient pas prononcées par la loi avant qu'ils fussent commis."

Whence was this maxim derived? Nothing of the kind is to be found in the Roman law, or the works of the Glossators. The texts which have, in later years, been quoted as authority for it, fail entirely to support it;

and nothing is clearer than that the power of the judge in the *extraordinaria judicia* of the Roman imperial law (which, as is well known, were the prototypes of all criminal procedure after the revival of that law in the Middle Ages) was utterly inconsistent with any such principle. The earliest writer accessible to us, in whom anything even remotely resembling the maxims quoted above is to be found, is Menochius, born 1532, died 1607.

We find the rule laid down by Menochius in this form: Pœnam alicui non esse indicendam, nisi expresso jure cautum sit. De arbitrariis judiciis, 4, 3; cas. 276, 1; De presumptionibus, 4, 5; præsumptio, 49. He speaks of it as a rule explained by many of the interpreters of his time, and quotes as authority for it, Dig. XI., t. 7, 14, § 14, and Nov. 2, c. 3. It will be seen, on reference to these passages, that they have little to do with the doctrine referred to above. It is evident also from Menochius's own illustrations, that the maxim given by him was more frequently referred to cases where a penalty was imposed by contract, or by will, than to those of the criminal law. He mentions a *dissentio dominorum*, which otherwise has not been handed down to our times, approving the opinion of Decius, and the doctors generally, against that of Baldus, that a woman should lose her dower for a kiss, on this ground, — cum nullo jure cautum sit. If any of our readers wish to investigate the controversy further, they may look at the gloss in rubri C. de edendo, II., t. 1. But what is more to the point, he quotes a statute of the city of Pavia, No. 67: Quod nullus pœna corporali possit puniri, nisi statuto caveatur; and one of Milan to the same effect.

Menochius discusses at some length the question whether these statutes change the common law, — *e.g.*, if a particular offence is punished by that law with corporal punishment, and the statute provides no such punishment against it, can it be punished? The argument on both sides is too long to quote here, but is strikingly like those employed to-day in the states where a similar question has been raised. The same doctrine, that a statute cannot be interpreted to alter the common law, unless it does so by clear and specific words, is answered as it would be to-day: Licet statuta et constitutiones jam relatæ non corrigant specifice jus commune: attamen cum dicant, neminem esse puniendum pœna corporali, nisi legibus ipsis municipalibus cautum sit: necessario intelligimus jus commune abrogari, alioqui nihil operarentur.

Menochius points out clearly the connection between this doctrine and

the rule of favorable interpretation in criminal cases, by inferring the latter from the former. Since a penalty cannot be imposed, unless authorized by an express provision of the law (quoting as authority the passages already referred to), the manifest presumption arises from this that, in case of doubt, the milder penalty is presumed to be imposed by the law or the judge, since in such cases the interpretation must be very strict. Hence Alciatus wrote that the presumption was always upon that side by which the penalty is avoided. After illustrating this by numerous examples, he finally qualifies it thus: This presumption has no place when the milder punishment would encourage crime, or be substantial impunity. It is the intention of the legislator and the interest of the state that crime should be punished, and therefore criminal laws may even be extended by interpretation, rather than that crime should go unpunished. (In pœnalibus admitti extensionem, ne alioqui delictum remaneat impunitum.) And for this he cites Bartolus and other authorities. Menochius, De Præsump., Lib. V., præs. 49. See a similar opinion of Plowden, p. 468, quoted *ante*, p. 89.

Upon the present acceptation of the doctrine in Europe, the following quotation from Mittermaier will suffice: "The question is of special importance in its bearing upon the boundaries of criminal law. If we ask whether there are natural crimes, — that is, crimes the culpability of which results from the very laws of human reason, so that they must be punished by every people, — it must be answered in the affirmative. Such are the *delicta juris gentium* of the Roman law, and the *mala in se* of the English. But it is a different question whether there are crimes which the judge must punish, even if the positive law of the land imposes no punishment upon them. Especially in cases where there is a complete criminal code, can the judge punish acts which he regards as worthy of punishment on general principles, though no warning of such punishment is given by the positive law? This question must be answered in the negative. All the newer codes recognize the doctrine, that no act can be punished judicially, upon which a penalty has not previously been imposed by legislation. [Citing them as above.] It is altogether a different question, whether in Roman law the judge could punish without a previous lex. This to be answered by a study of the delicta juris gentium." L. 42, D. de Verb. Sign.; L. 38, § 2, D. de Leg. Jul. de Adulter.

The doctrine of the common law on this topic will be found in 1 Bishop's Cr. Law, § 36, and notes So far as the jurisdiction of the United States

is concerned, the doctrine is substantially the same with that of the civilians, although the reasons given for it are not entirely the same.

"The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offences; but if by latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism; nevertheless the doctrine is fundamental in English and American law, that there can be no constructive offences; that before a man can be punished, his case must be plainly and unmistakably within the statute; and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused." These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States. United States *v.* Morris, 13 Pet. 464; United States *v.* Wiltberger, 5 Wheat. 76; United States *v.* Sheldon, 2 Wheat. 114. See also Ferrit *v.* Atwill, 1 Blatchf. 151, 156; Sedgw. on Stat. & Const. Law, 324, 326, 334; 1 Bishop's Cr. Law, §§ 134, 145; Dillon, J., in United States *v.* Clayton, 2 Dill. 219; 1 Green's Cr. Rep. 439.

In the jurisprudence of the several states the maxim is universally recognized, but the meaning attached to it in different states is widely different. Two principal classes may be formed; in one of which the maxim is applied strictly, and no act can be punished as a crime unless a specific statute has characterized it as such, and affixed a penalty. For illustrations of this doctrine, see Estes *v.* Carter, 10 Iowa, 400; Allen *v.* The State, 10 Ohio St. 287.

In the other and larger class, the maxim is applied only to minor questions, and the existence of common-law crimes is fully recognized. It is held that the officers of government have authority derived from the general rights of the government, without any statute whatever upon the subject, to exercise all necessary force for the prevention of crime, either by the arrest of individuals or by the seizure and detention of the instruments for committing crime. Spalding *v.* Preston, 21 Vt. 9.

In both classes alike, the principle is held to require the most explicit and distinct notice to the person charged, of the charge made against him.

The plain rule of the common law is that no man shall be held to answer for any crime or offence until the same is fully and plainly, formally and substantially, made known to him, that he may have every advantage of previous notice in making his defence, both upon the matter of fact and of law. *Per* Shaw, C. J., in The Commonwealth *v.* Child, 13 Pick. 198, 200.

This plainly intends that the meaning shall be evident from the words themselves, — *i.e.*, from the sense they convey to all men alike, and not from any extraneous facts which would put a peculiar meaning on the words, even though all men, knowing such facts, would derive the same peculiar meaning from them. Thus, in cases of libel, it has been held that if the writing is such that every man would put the same construction upon it, by understanding something not expressed, without which the writing would not be libellous, in such case that thing must be set forth in the indictment, in order that the jury may take cognizance of it. Rex *v.* Horne, Cowp. 672, 683; The State *v.* Atkins, 42 Vt. 252; The State *v.* Corbett, 13 R. I. 91.

The rule that a penal statute is not to be extended by analogy to cases not within the letter — or, in our phrase, that there shall be no equitable extension of such a statute — is recognized in all civilized nations, and is much insisted on by the civilians and canonists. Its reason is thus stated by one of the most authoritative of the casuists. After stating that some held to an ânalogical extension of penal laws, — quia, ut dicunt, etiam lex pœnalis extendi debet de casu ad casum quando currit eadem ratio, et crimen est gravioris malitiæ, — he thus refutes them, and at the same time gives the reason of equitable extension in other cases: Quia ratio primæ sententiæ currit in lege præceptiva, quæ omnino pendet a ratione legis; non vero currit in lege pœnali, quæ pendet non solum a ratione legis sed eteam a voluntate legislatoris; ideoque in ea non valet argumentum a pari. De Ligorio, Theologia Moralis, Tom. I., p. 451, ed. Mediolani, 1849.

The law must specify clearly what acts are forbidden; but it is a mistaken exaggeration of the need of clearness that leads to the anxious specification of things merely permitted, — *e.g.*, of the extent to which a parent's power may be exercised, or of the right of asylum granted to one in his own house. Such explicit declaration of what is merely allowable incurs the danger that men may be led thereby to claim as a positive right what has been left to them only because it was impossible practically to prevent it. Trendelenburg, Naturrecht, § 172.

NOTE K.

ON THE CONSTRUCTION OF CONTRACTS, ETC.

Construction is the drawing an inference by the aid of reason as to the intent of an instrument, from given circumstances, upon principles deduced from men's general motives, conduct, and actions.[1]

The intent of the parties to an agreement or contract is to be gathered from external signs and actions; for, whatever difference there may be between a man's internal sentiments and external expression, he must, in his ordinary transactions with mankind, be concluded to use signs according to their common acceptation; for there could be no such thing as an obligation, if a man might affix what interpretation he pleased to his signs, and pretend that he meant to use them different from their received signification. Therefore he in whose favor an obligation is incurred has a right to compel him from whom it is due to perform it in that sense which the ordinary interpretation of the signs made use of import.[2]

The signs of the intentions of men are of two sorts, namely, words and actions.

As to positive words. The rule seems to be that, unless there be the most decisive reasons which lead us to conjecture the intent was otherwise, they are to be understood in their proper and most known signification. Not the grammatical one, which regards the etymology and original of them, but that which is vulgar and most in use; for use is the judge, the law, and the rule of speech.

But when words are equivocal, or sentences are ambiguous, and capable of several significations, conjectures are necessarily resorted to in order to discover the true meaning of the parties; and such conjectures may be made from three sources, — the subject, the effects, and the circumstances.

I. First, it is a rule that words are to be understood according to the subject of them, which is thus expressed by the civilians: Verba generalia restringuntur, ad habilitatem personæ, vel ad aptitudinem rei.

II. "To give effect to the intent," the construction of a contract, as to

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[1] Powell on Con., p. 223.

[2] *Ibid.*, p. 225.

the manner of its operation, will vary according to accidental circumstances affecting the state of the subject contracted about, after the contract entered into and before its completion.

III. So, ut res magis valeat quam pereat, the construction of the same kind of contract, as to the manner of its operation, will vary in different cases, according to the manner in which it is carried into effect.

Secondly, the effect and consequence that will follow from accepting words in their ordinary import frequently leads us to a necessary conclusion that the genuine meaning of the person using them is different from their common acceptation, — as where words, if taken according to their ordinary sense, will render a contract ineffective and frivolous. In such case, we may a little deviate from their received sense to prevent this inconvenience; for, verba aliquid operari debent, et cum effectu sunt accepienda.

Thirdly, the actions or circumstances attending a transaction may be called in aid to explain the nature of dealings between parties, where otherwise an ambiguity hangs over them.

In some cases, the ordinary import of words may be restrained.

First, where there is an original defect in the will of the speaker, so that it is not coextensive with his words.

And, secondly, where there is some collateral accident inconsistent with the speaker's design.

Under the first of these distinctions we may comprise all cases where there is good reason to conclude that the person who spoke was aware of certain things, and yet did not intend to include them in the general terms he used, though he did not expressly except them, because he supposed such an exception clear in itself.

The principle in the second instance is, that the matter in hand is always presumed to be in the mind and thoughts of the speaker, though his words seem to admit a larger sense; and, therefore, the generality of the words used shall be restrained by the particular occasion.

Secondly, an original defect of the will may be discovered where there is some collateral accident falls out inconsistent with the speaker's design; as in a case where something happens that could not be foreseen, but is such as, if it had come into the mind of him who spoke, he would have excepted it. But if there be in the terms of a contract any obscurity or dubiousness, which cannot be cleared up by the intention of the contracting parties, or any other circumstance, and all other rules of exposition of words

fail, then the construction ought to be against him who ought to have explained himself or made the other have delivered himself fully. On this rule of construction the law of England agrees with the Roman law, wherein it was a maxim that all obscurities and ambiguities in a bargain of sale or letting must be interpreted against the seller or landlord. In this respect the determination of the common law of England and the Roman law are, in some instances, in opposition to the nature of things; for if the thing contracted about be burdensome to the party whose words are to be expounded, the interpretation, to be agreeable to the intent, as the latter must be presumed from the nature of things, ought to be favorable to him; for every one seeks his own advantage, and consequently engages himself to as little inconvenience as possible; whereas, according to the construction alluded to, he is presumed to have bound himself as strictly as the words in their largest sense will effect. Therefore perhaps we should come nearer the truth if we were to hold that the contracting party for whose benefit the agreement is burdensome to the other is he who should either explain himself, or make the other explain himself, with all the clearness necessary to prevent ambiguity or obscurity. Therefore the construction should always go against him.

In some instances construction is, in the law of England, made according to the rule last mentioned; that is, where the contract or agreement contains something in its nature odious; of which kind are all contracts that carry a penalty with them, or lay the charge on one party only, or on one more than another.

Upon this principle, words or sentences in the condition of a bond, which, considered simply in their own nature, are equivocal or ambiguous, shall *generally*, in respect of the object of the condition, be taken in ease and favor of the obligor; the reason of which seems to be, that they are inserted for his advantage, and to discharge him from a penalty.

Upon this principle it has been determined that where the condition of a bond consists of two parts in the disjunctive, and *both* are possible at the time of the bond made, and afterward one of them becomes impossible by the act of God, the obligor is not bound to perform the other part.

Another exception to the rule of accepting ambiguous words most strongly against the speakers is, where such construction will work a wrong to others.

Subject to the above observation, words are to be understood in the most comprehensive sense in which they are generally accepted, — as the masculine is to be understood as including both genders.

And an indefinite expression shall be understood universally, unless there be otherwise some reason to restrain it.

If a man speak in legal language, his words shall be taken in their most comprehensive signification; they include whatever they signify in that sense which the law has imposed upon them.

And in expounding contracts and agreements, that construction is made of them which is consonant to the general intent, as it appears in the context.

Words may be transposed to give effect to the intent, where that is evident.

The executors of the contracting parties are implied in themselves, and bound without naming, if, from the nature of the contract, it appear that the parties so intended.

[When the reference to this note was made, at page 152 of the text, it was the editor's intention to add here a full collection of recent American cases illustrating the construction of contracts, wills, deeds, etc., classified according to the excellent arrangement of the subject given by Mr. Powell. For this purpose he had made full abstracts of nearly four hundred carefully selected cases. But, upon consultation with the publishers, he found that he had already exceeded the limits within which they had expected to keep the size of the volume, and that these cases, and much else, must be omitted. To print a mere list of the cases would be of little service, as our libraries are already full to repletion of digests, indexes, and treatises, the object of which is to refer to them. This work makes no attempt to be a guide to the adjudged cases for the use of practitioners; and the editor is less reluctant to omit the matter mentioned above, because it is not an indispensable part of his proposed task as stated in his preface.]

NOTE L.

ON LEGAL DEFINITIONS.

The logical rules of definition, especially that which requires it to contain the next higher *genus* and the *specific difference*, should be strictly observed in law; for, if the definition be too wide, it will cover relations and acts that the law intended to exclude; if, on the other hand, too narrow, it will permit such to escape which it was the purpose of the law

to regulate. Where the genus and the difference suggest each other, and form a single idea, we have a proper legal conception from which we may reason deductively.

Definitions are of the utmost importance and greatest influence in law, because each one forms the basis of innumerable subsumptions, and either restricts or enlarges the application of the law to actual cases. The very name implies that they form the bounds of our conceptions; and, in law, they thus give shape to our legal relations and institutions, and have formative power. The ancient and oft-quoted rule that all definition in law is perilous, for one can rarely be found that may not be overthrown (omnis definitio in jure civili periculosa: parum est enim ut non subverti possit. L. 202, D. de regulis juris, L. 17), recognizes the difficulty of fixing the ever-changing relations of actual life in sharply defined phrases, expressing the true law of their formation, but it is not intended to dispute or underrate the constant need of the process. Correct definitions are the logical guaranties of all certainty in the law, — the guardians of its provisions. Trendelenburg, Naturrecht, § 74.

The requirement that a definition shall be composed of the genus and specific difference of course implies that the matter or word to be defined belongs to a science capable of exact and complete classification, and already classified, so that each term in it may be referred to a distinct genus, class, or order. When the rule was formed, this was held to be the case with all sciences, — with the moral sciences even more truly than with the physical ones. But modern thought has abandoned most of the schemes then adopted; and there are very few provinces of ethics or law in which a real definition can now be framed in a strictly logical form, with any prospect of general acceptance, as the true and necessary expression of an order existing in the nature of the things defined.

We are therefore obliged, in most cases, to describe rather than define a legal term, by enumerating a greater or less number of characteristic marks, by which its identity may always be determined, though its exact relation to other conceptions or terms may not be defined. In logical language, we employ *consecutiva propria* (constant properties), instead of the *constitutivum*, or cause, which makes the thing defined to be what it is; and, logically imperfect as the process may be, it is much safer and better, than the attempt to produce a definition perfect in form, but not answering to the true meaning of the term. The latter process always leads to confusion of thought and mistaken inferences, while the former

is often practically useful. It fixes the sense of a term for the case in hand; and that is usually sufficient, in our present modes of forensic and judicial argument.

The distinction between the two processes, of definition and description, is well illustrated in the following passages: —

Præsumptio juris dicitur quia a lege introducta est: et de jure quia super tali præsumptione lex inducit firmum jus et habet eam pro veritate. Menochius, de Præsump., Lib. I., qu. 3, 18. Menochius discusses these at length in qu. 4, *et seq.:* "Baldus hanc præsumptionem ita definit vel describit potius ut sit animi legislatoris applicatio ad verisimile, confirmata sanctione. Verum plenius et melius idem ita: est status a jure promulgatas ex indubia conjectura. Cum aliquibus positis verisimiliter atque ita probabiliter non autem necessario sequitur quod intendimus. Ita Fabius: Hanc ita diffinit vel verius describit Baldus. Est animi legislatoris ad verisimile applicatio onus probandi transferens."

So, Leyser (Opp. XIII., 19, De Assentatoribus, § IV.), says: Progredimur ad definitionem assentationis, aut potius descriptionem. Accurata enim et secundum regulas ab Aristotele præscriptas confecta a Jcto qui more majorum res magis quam verba spectat exigenda non est.

It should be added, however, that there is not the same difficulty in verbal definitions, especially when employed by a writer who has in some degree the power of selecting and arranging his own terms, and limiting their extent. There seems to be no excuse for the utter disregard of all logical rules of definition, common among our recent law-writers. What is commonly offered under the name of a definition is rarely more than a description, and too often a loose and inaccurate one at that. Not infrequently, a definition unobjectionable on its face is followed immediately by matter utterly inconsistent with it: as when a bailment is defined as a contract, and the definition illustrated by cases of bailment that are not contracts, for want of a consideration, and other cases of bailment sounding in tort. Such definitions do less harm than they otherwise would, because their defects are so gross that the habit of arguing from them has almost entirely ceased. Judges and practitioners have come to disregard them almost entirely. It is only the teacher of law who can appreciate the mischief they do, in confusing the learner's mind, and destroying his confidence in the theoretical parts of law. They do him good service, indeed, upon examination, and are painfully learned by rote for that use. But after this, it never seems even to occur to him that they are meant for

any other purpose, unless he becomes in turn an examiner, and brushes up his recollection of a few of them, that he may test thereby the knowledge of a new generation. That the whole doctrine on the subject in question may have been changed in the meantime, by new decisions or legislation, does not make them less useful. Neither the examiner nor the legal author seems to think for a moment that the definition has any connection whatever with the actual state of the law comprehended under it. A common defect in books recently written for students is the use of vague general terms, and inexact colloquial definitions, — apparently with the idea that these will be more easily understood by the beginner, than the exact, specific language in which legal rules have been laid down by the courts. (I do not mean that exceptions and qualifications are omitted, to give only the broad rule of general application; for this, if done with discretion, is a very useful and even necessary process.) There could hardly be a greater mistake. The beginner needs, above all things, the very qualities that are here systematically disregarded. The law he learns should be such as he may treasure up in his mind, and find useful to the very end of his life. And this for two reasons: (1) that it will most probably be so treasured, be it good or bad, from the advantage it has in time; (2) but still more important, because he is not yet prepared to apply general truths, and judge for himself as to the applicability of broad statements. He is only confused, not instructed. Law that cannot be stated with precision will do him *now* more harm than good.

The definitions of the Roman law are highly praised by the civilians, who find in them a constant effort at clear distinction of legal ideas. Trendelenburg (p. 169) gives, as example, the definition of *morbus* and *vitium*, in L. 1, D. XXI., 1. Compare Gellius, 4, 2.

Mr. Phillimore, in his Principles and Maxims of Jurisprudence (p. 371), selects also the following: L. 60, D. XLII., 1; L. 1, D. IV., 3; L. 246, D. L., 16; L. 12, D. XXXIII., 7; and L. 51, D. LIII., 3.

NOTE M.

ON WRITTEN AND UNWRITTEN CONSTITUTIONS.

The paramount importance of written constitutions in our American systems of government has given to their construction an amount of attention and study far greater than that which has been given, either in Eng-

land or America, to the interpretation and construction of other forms of law. Very little could be said here, on that topic, that has not already been better said in Judge Cooley's excellent work on Constitutional Limitations, and the other treatises on the topic. In Note A, on the Bibliography of Interpretation, I have mentioned only such as discussed the theory of Interpretation. The works that simply interpret, without entering more than incidentally into the *rationale* of the process, are very numerous. Judge Story's Commentaries on the Constitution of the United States (which has also been edited by Judge Cooley) stand at the head of these in popularity. The Federalist still maintains its place as an almost *authentica interpretatio*. Two other works of inferior value to this, but only to this, are now undeservedly neglected. I mean Tucker's Blackstone and Judge James Wilson's Lectures on Law, delivered in the College of Philadelphia in the years 1790 and 1791. I mention these two together, because they may serve as types of the two original schools of constitutional construction. The strong state-rights theory of the former work is well known by tradition, though the book itself is rarely seen, at least in the Northern States. Judge Wilson's works have also been long out of print, and even his name is less familiar to our contemporaries than his services to the country deserve. It shares with five others — four of the six being from Pennsylvania — the honor of being appended both to the Declaration of Independence and the Federal Constitution, and is found in the roll of associate justices of the United States Supreme Court, where Judge Wilson sat from its first organization until his death, in 1798, when he was succeeded by Bushrod Washington. Judge Wilson's style is ornate and redundant, and his theory of law, like that of most of his contemporaries, lacks precision and positiveness, but his writings deserve study as a valuable contemporary exposition of our form of government. I have referred to them more particularly in Note D, *ante*.

The number of brief treatises issued since the Rebellion is very great, and they vary widely in merit, and in their views. Prof. Pomeroy's Introduction to Constitutional Law is a convenient manual for students, but ought not to be used without a warning against the extreme centralizing doctrine it contains, reducing the states to a relation with the Federal government like that which its counties hold to each state. It also maintains (see § 99) a doctrine which I do not remember to have seen elsewhere: that there is a common law of the Union, the supremacy of which over the state laws and constitutions is declared by the Federal

Constitution, Art. VI. Another work of value, and almost alone of its kind, is The Constitutional Convention, its History, Powers, and Modes of Proceeding, by Hon. John A. Jameson. The published debates of a large number of constitutional conventions contain much matter that would be instructive, if it could in some way be digested, or at least indexed, and the wheat distinguished from the immense profusion of chaff which most of these bulky volumes contain.

The principles which govern the interpretation of written constitutions do not differ materially from those of other written law; but some embarrassing questions, on which there has been no little fluctuation of decisions, seem to have grown out of the relation between the written and the unwritten constitutions. Some judges, more familiar, no doubt, with the practical effect of their rulings upon suitors' interests, than with the theoretical and historical antecedents upon which they rest, have gone so far as to deny altogether the existence of unwritten constitutions in America! "I think the doctrine that we have an unwritten constitution, upon which courts may plant themselves to overturn and annul an act of the legislature, is unsound, without precedent, and dangerous." *Per* Cole, J., in Hanson *v.* Vernon, 27 Iowa, 28, 78. This opinion was, indeed, a dissenting one, but the author of it was also one of the victorious majority who overruled it in Stewart *v.* Supervisors of Polk Co., 30 Iowa, 9, and McGregor & S. C. R. R. Co. *v.* Birdsall, 30 Iowa, 255. The three cases, taken together, are worth careful reading, especially for any one who is familiar with the extra-judicial history of the question of taxation in aid of railroads.

It can hardly be matter for surprise that those whose knowledge of the law is founded solely on the legal literature of the day should fall into the error of expecting to find the existence of an unwritten constitution dependent upon recent precedents. The distinction between written and unwritten constitutions has been brought out so sharply by the contrasts of American and English law, that the connection between them has been thrown quite into the shade. The language of some of our ablest treatises has been susceptible of misconstruction on this point. The relative advantages of written and unwritten constitutions have been discussed as if there might be a choice between them; as if the written constitution superseded or prevented the unwritten one, or could be adopted without the previous existence of an unwritten one. See, for illustration, Jameson's Constitutional Conventions, §§ 63, 74–83; Pomeroy's Municipal Law, § 352 *et seq.*

In this connection the editor ventures to refer to an article on Constitutional Limitations in 3 Western Jurist, 65 (April, 1869), for remarks on this point, that space will not permit him to repeat here.

No truth can be clearer to the student of history and law than that a written constitution of any value always presupposes the existence of an unwritten one. To use Judge Jameson's phrase, the constitution as an *objective fact* must exist, before the constitution as an *instrument of evidence* can have any value. The worthlessness of written constitutions that have not unwritten ones beneath and behind them, is one of the most frequently recurring lessons of the nineteenth century. Dr. Lieber has pointed out the distinction of enacted and cumulative constitutions (Civil Liberty, 3d ed., by President Woolsey, p. 162, note), but speaks of the former as if they were merely due to "the positive enactment of the whole at one time." He has shown elsewhere too clearly his sense of the relative value of the two forms to be misunderstood; but this hasty setting up of one against the other accounts for many of the misconceptions and false arguments found in newspapers, and even in courts of justice, on the subject.

It would hardly be an exaggeration to say that a modern civilized state could not exist without an unwritten or cumulative constitution, such as Austin has described in the following passage: —

"In every, or almost every, independent political society there are principles or maxims which the sovereign habitually observes, and which the bulk of the society, or the bulk of its influential members, regard with feelings of approbation." Lectures on Jurisprudence, I., p. 273.

In this sense the constitution may be monarchic, or democratic, or aristocratic, and may give more or less security to the subjects. It denotes merely the permanence and moral power of certain institutions or maxims of government, etc., regarded as having peculiar claims on the respect and obedience of all, on the legislature not less and no more than on the people or the executive.

But inasmuch as such a constitution is particularly valuable when regarded as protecting the subject from abuse of power in the sovereign, or from arbitrary changes of the law, it has become usual in modern jurisprudence to confine the term "constitutional government" "to those whose fundamental rules or maxims not only locate the sovereign power in individuals chosen or designated in some prescribed manner, but also define the limits of its exercise, so as to protect individual rights, and shield

them against the assumption of arbitrary power. The mere grant of a constitution does not make the government a constitutional one until the monarch is deprived of power to set it aside at will." Cooley's Constitutional Limitations, p. 3, and note.

The marks of such a constitution are said by Robert von Mohl, one of the most eminent of modern European publicists, to be these: 1. That the entire power of the state is administered according to law, and for legal objects, by an executive either monarchical or chosen for a definite period. 2. That all powers and rights involved in the administration are exactly defined. 3. That all claims of the citizens, either as a body or as individuals in the state, should be determined and equalized. 4. And secured by appropriate means; especially by a body of citizens convened for that purpose. Geschichte und Literatur der Staatswissenschaften. Erlangen, 1855. I., p. 268.

Some of these seem to an American to be marks of a *free* rather than of a constitutional government. But the difference is unimportant: since a free government can only be permanent by means of a constitution, and a constitution is chiefly of value as it sustains freedom. That constitutional government in this sense existed in England and America long before the first reduction of the constitution of any state to writing, is too familiar a matter of history to be proved here. It may be worth while, however, to show that not only the theory but the name was then accepted.

The General Assembly of the Colony of Rhode Island, in October, 1749, appointed a committee "to prepare a bill for introducing into this colony such of the statutes of England as are agreeable to the *constitution*." Their report was made and the statutes adopted in the following year. See note to Potter *v.* Thornton, 7 R. I. 262. It was in the same state, and long before it had a written constitution, that the first legislative act was declared unconstitutional. Trevett *v.* Weeden, stated in Cooley's Const. Lim., p. 26, note. Rhode Island had no written constitution until 1842, more than fifty years after it became a member of the Union. The same was the case with Connecticut until 1818. Were these states not constitutional governments?

The case of Trevett *v.* Weeden has a particular interest as showing that constitutional limitations upon legislative power do not necessarily presuppose a written constitution, but may be recognized and enforced by the courts even when the "higher law" is an unwritten one. All the recent cases which state, as a ground for holding laws unconstitutional, the fact

that the legislature have assumed power not truly legislative in its character, prove the same thing; for certainly it is to the unwritten constitution, not to the written one, that we must go to learn what power is legislative. It may not make much difference whether we recognize formally the existence of an unwritten constitution here, or say that intepretation gave us the meaning of the term. The result in either case is the same: that we have a binding limitation upon legislative power not contained in the words of the written constitution.

At the same time, I do not mean to question the common theory that the unwritten constitution has *for the most part* a moral and not a legal force. It appeals to the conscience of the legislator or the citizen, and does not compel him. While the written constitution is undoubtedly more effective in this regard, the advantages are not all on its side. See Story on Const. (Cooley's ed.), § 1576, note 1, and Boudinot's remark in 1 Wilson's Works, 463.

It is this continuing existence of the unwritten constitution that preserves its identity through all changes of the mere written constitution. Hence it is that a change of the written constitution does not abrogate rights of property, or contracts previously entered into by the state. If it were the written constitution that created the state, these would vanish with it. Their persistence proves that the same constitution, the same constituted state, still exist. Jefferson Branch Bank *v.* Skelly, 1 Black, 436; Dodge *v.* Woolsey, 18 How. 331; Sigur *v.* Crenshaw, 8 La. An. 401.

It has been held that even a constitutional convention, though representing, as completely as any organized body can, the body of the people, — the power known as the sovereign of the state, — cannot exercise more than legislative power, or destroy this continuity of existence in the state. Lawson *v.* Jeffries, 47 Miss. 686; 12 Am. Rep. 342. (This case contains some very just remarks on the topic; but its method of discussing the questions at large, and then concluding with two solid pages of authorities examined, reminds one irresistibly of the famous precedent of Lord Timothy Dexter, who printed all the punctuation of his book in an appendix at the end.)

The limitations which grow out of the very nature of legislative power, and therefore are and must always remain unwritten, are forcibly stated in Loan Association *v.* Topeka, 20 Wall. 655 (1874), by Miller, J., a judge whose opinions on all constitutional questions have great weight: —

"There are rights in every free government beyond the control of the

state. * * * The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social contract could not exist, and which are respected by all governments entitled to the name."

The following passage also, from the dissenting opinion of Beck, J., in 30 Iowa, 45, seems to me to go to the very heart of this question: —

"The [written] constitution is not the origin or foundation of the people's rights; it confers none that they did not possess before its formation. When they formed the instrument, they were possessed of all rights with which nature endows all men. Society organized upon the basis of Christianity and a high state of civilization, the institutions pertaining thereto, and the inalienable rights of man, were in existence and recognized as the inheritance of the people. For the protection and preservation of these the people established this free government. Its framework is the Constitution. It is obvious that by the Constitution the people surrendered no rights they possessed before it was formed, that an enlightened and Christian people ought or may enjoy under a free government. Whatever rights of the people are demanded by a government designed to protect the rights of life, liberty, property, and the pursuit of happiness, existing before the Constitution, the people surrendered in that instrument, and no other. Those not surrendered are the reserved rights of the people referred to in § 25 of the [Iowa] Bill of Rights. Over these no power in the state is supreme. The power conferred upon the General Assembly by the people, in the Constitution, is a power to legislate upon all rightful subjects of legislation in a manner that shall not interfere with their reserved rights. If it be not so, then have the people failed of their purpose in the formation of the Constitution, which cannot be admitted."

It is very remarkable that the Romans, with their genius for legislation, should have habitually inserted in their laws an express provision against any unforeseen interference with religion and morality. This was the famous saving clause, Si quid sacri sancti est, quod jus non sit rogari, ejus hac lege nihil rogatur. "Is there any thing," says Cicero in his Oration pro Cæcina, cap. 32, 33, "which the people may not by law command or forbid, because it is not right? This clause proves that there may be,

for if there were not this clause would not be embodied in all our laws." See also a still fuller discussion of it in his Oration pro Balbo, cap. 14; and it is mentioned also in that Pro domo sua, cap. 40. These passages are all collected and the whole subject explained in Brissonii, De Formulis, Lib. II., cap. 14. We have also a proof of the constant use of the clause, in the fact that it was one of those abbreviated in the work of Val. Probus. See Huschke's edition, in his Jurisp. Antejustiniana (ed. 1867), p. 71, § 3.

Yet the Romans recognized with the utmost clearness (having no written constitutions to modify their conceptions of the truth, as it must be modified to-day) that a law cannot be so framed as to be secure against repeal by future legislatures. This lies in the very nature of legislative power. It was clearly pointed out by Cicero, to whom it was a question of practical interest. Clodius had inserted in the law banishing him a provision that neither the senate nor the people should repeal that law (nec per senatum, nec per populum posset infirmari sua lex). In the proposed law recalling him, the tribunes had inserted a clause which would leave this provision in force. Cicero discusses the matter in one of his Letters to Atticus, Lib. III., cap. 22. The sanction of a law, he says, is never regarded when it is to be repealed, otherwise there could never be a repeal. For every law would then fortify itself with provisions against abrogation; but when a law is abrogated, these provisions are abrogated with it.

To the same effect, and substantially in the same language, Lord Bacon in History of Henry VII.

NOTE N.

ON PRECEDENT AND THE DOCTRINE OF AUTHORITY IN THE LAW.

The question of the weight of legal precedents may be stated in two quite different forms, implying different problems; and it seems to me that much of the uncertainty which still hangs over the subject, even in professional minds, is due to the lack of a proper discrimination between them. We may ask, in the first place, why precedents have, as a fact, exercised so much influence on men's minds and determined the decision of subsequent cases. Or we may ask, secondly, what weight *should*

be given to them, upon principle, and upon what theory of law the courts are to hold themselves bound by prior adjudications. The two questions are distinct, although intimately connected. They belong, the one to the historical, the other to the philosophical aspect of the law; and as it is only by a spirit of partisanship, acting on imperfect and one-sided knowledge of the subject, that these two aspects have been converted into opposing theories, so it is only by the neglect of an important element that the philosophical question is lost sight of in the historical. When we ask why we have done or are doing so and so, we can be content with an answer which gives us the reason of the action as a mere fact. But the moment this fact is presented to our consciousness, — which in this sense, as well as etymologically, is the same thing with our conscience, — we cannot help considering it in another light, provided the action in question still continues, or is to be repeated in the future, as in all legal questions is implied in the very nature of law as a general rule. We cannot go on doing it *merely* because we have done it before, or *merely* because the motives for doing it before still continue to operate upon us. We must inevitably scrutinize these motives and their reasons, and ask whether, upon reflection, we can continue to act upon them; or in other words, whether we *ought* to continue the custom or the precedent. The question what we do becomes what we ought to do, by the very law of our reflective, self-conscious being.

This seems to me to have been overlooked by many writers, especially of what is known as the historical school, who describe correctly the processes by which customary law is generated in early times, and among rude, unreflective peoples, and then take for granted that the same processes must be sufficient to account for all the subsequent developments. Others by the same oversight are led to ignore or underrate the essential unity of customary law in both its stages, and make of the second or reflective stage of its development a distinct species of law, such as the *Juristenrecht* of some German writers. See, for example, the essay upon Volkrecht und Juristenrecht of Beseler, and indeed the whole of the controversy to which that book gave rise.

Most writers on customary law try to frame a theory of the connection between the two notions "custom" and "law," so as to explain in what way the binding force of the latter is derived from the mere sequences of fact in the former. It may well be doubted whether such

theories can have any value for the early periods in which the enforcement of customary law begins, — to say nothing of the still earlier period, in which it probably was observed as custom before being enforced by public authority. For proof of the existence of such a period, see Hall's account of the Innuits, where there is no government whatever, every Innuit being, as he often says, "independent," and yet under complete bondage to the customs of the "first Innuits," their ancestors. C. F. Hall's Arctic Researches, and Life among the Esquimaux (New York, 1866), especially chap. 37, and pp. 463, 467, 468.

We may explain the connection of the two things in our own minds, or the manner in which that connection has gradually grown up in recent centuries; but the primitive mind is too unlike ours to enable us to trace its workings with any success from mere *à priori* considerations, or speculations as to what "must" have been the case.

Probably the mere instinct of imitation, common to man with the higher animals, may have had something to do with the origin of the customs; and the dependence on parents, always greater and of far more relative importance among savages than in civilized lands, would account for much more. (Hall, p. 445.) It may be said that the latter takes us already within the field of moral obligation, and therefore must be accounted for *as* law. But does it certainly? Does a savage obey or even reverence and honor his parent because he ought to? That is merely assumed, and most of the evidence is against it. There certainly is nothing thus far inconsistent with the assumption that custom is binding merely as custom, and without a thought of what we should to-day recognize as of the nature of law.

No doubt some reasons can be given why precedents should be followed, as such, and without giving them the character of a binding rule. These have been fully treated by Dr. Lieber in Chap. VII. of the text. These considerations have a place also in law; for it is by them that we must explain, in part if not wholly, the frequent cases where precedents that are acknowledged to have been wrongly decided in the first place, or not to be founded in principle, are still adhered to because they have become rules of property, etc.

When a particular doctrine has been followed in practice for a long time, and especially when it is one upon which rests the validity of many settlements or titles to real estate, courts will follow it even if there is no other reason for their doing so. See the conclusion of Lord Ellenbor-

ough's judgment in Doe *v.* Manning, 9 East, 59–71 (1807). Also remarks of English judges, collected by Cooley; Cooley's Const. Lim. 51, note. As to extra-judicial precedents, see also Troup *v.* Haight, Hopk. Ch. 268; Meriam *v.* Harsen, 2 Barb. Ch. 269; Bank of Utica *v.* Mersereau, 3 Barb. Ch. 577; McKeen *v.* Delancy's Lessee, 5 Cr. 32; McFerran *v.* Powers, 1 Serg. & R. 106; Sedgw. on Stat. & Const. Law, 215 *et seq.*

In Strong *v.* Clem, 12 Ind. 37, the court held that where an estate had been conveyed by the husband alone, the wife not joining, and the Legislature had subsequently abolished dower and substituted a fee-simple estate in one-third, such an act could not constitutionally apply to give the widow her thirds in such case, as it would be an unconstitutional divesting of vested rights. This was followed by cases in vols. 12, 13, 14, 15, 16, 20, 22, and 29 Indiana, and fully reviewed and affirmed in Harrow *v.* Myers, 29 Ind. 469, as having become a rule of property.

In Bowen *v.* Preston, 48 Ind. 368 (1875), it was again discussed; and Buskirk, C. J., speaks of it thus: "The writer of this opinion concurs with his brethren that we should adhere to such ruling, though he is thoroughly satisfied that such ruling was *radically wrong, unsound in principle, and pernicious in its consequences;* but to overrule it now would not repair the evil it produced, and would unsettle titles."

The effect of the precedent in these cases is clearly shown by the distinctions made between decisions sustaining the validity of a certain kind of instruments, or a certain form of proceeding, and those denying their validity. It is evident that no general method of business can be formed on a mere negative as in the latter case. For instance: If the courts decide a certain form of guaranty to be good, it is evident that men will hereafter use that form and rely upon it; and that no court can subsequently declare it bad without the risk of great mischief, by making worthless existing contracts and obligations. But if the former decision had been that it were bad, the only practice that could be founded on such a decision would be a practice of abstaining entirely from the use of such a form; and a subsequent decision, reversing the former and holding the form to be good, would do little if any harm. This was exemplified in Brewster *v.* Silence, 8 N. Y. 207 (1853), overruled by Church *v.* Brown, 21 N. Y. 315 (1860); and the distinction above mentioned is expressly recognized by Comstock, C. J., in p. 335 of the latter case.

A precedent is authority in the highest sense of the word, and without reference to its merit or reason, when it is one made by a court having

appellate jurisdiction over that to which it is cited. Thus in England a decision of the House of Lords is binding on all the ordinary courts of justice, so that they will not even allow the same question to be argued again before them, but will only hear counsel as to the applicability of the cited authority.

For a good illustration of this see Lichell's Case, 1 Sim. (N. S.) 187 (1851), and Bert's Case, 1 Sim. (N. S.) 193. The argument before the vice-chancellor turned entirely on the question whether the case could be distinguished from Upfill's (H. L. Cas. 674), and the vice-chancellor took the case under advisement to compare it with the latter, though he said at the same time that he did not understand that case, which he intimates repeatedly (pp. 189, 196) was hastily decided and without sufficient consideration. Yet finding that the cases on trial could not be distinguished, he felt bound to decide them as Upfill's case was decided, saying: "Though I stated that I do not know that I quite understand Upfill's case, yet it is a perfectly binding decision no doubt."

The use of precedents as authority in this sense was very early recognized by the courts. In Horwood's Year Book, 32 Edw. I., p. 32 (A. D. 1304), we find it said: —

"Herle. But consider whether he shall be received to aver these three causes; for the judgment to be by you now given will be hereafter *an authority* in every *quœre admisit* in England."

Bracton proves the use of such precedents nearly half a century earlier, but I think this is the first judicial recognition of it.

But there are many degrees of authority. Almost any thing that may under any circumstances be admitted to influence the mind of a court has at some time been called an authority.

Where two courts have coördinate jurisdiction, though the decision of neither is *binding* on the other, still it will yet be termed an authority.

Thus, in Tetley *v.* Taylor, 1 El. & Bl. 521, 531 (1851), Lord Campbell, delivering the judgment of the Queen's Bench, says: "We have been (not unduly) pressed with the authority of Drew *v.* Collins, 6 Exch. 670 (1851). To that *authority* we have paid the most sincere respect; but after a very careful examination we are not able to assent to the reasoning on which it rests. As it is only the decision of a court of coördinate jurisdiction, we do not consider ourselves bound by it; and we have the less reluctance to decide according to our own opinion, as, the question being upon the record, it may be carried to the Exchequer Chamber and

the House of Lords." And it will be seen, on examining the two cases, that they are directly opposed to each other, though made in the same year, — one in June, the other in November. The latter was subsequently reversed in Exchequer Chamber.

Time of itself is a very important element of authority. The longer a particular case has been recognized as law, the more difficult it is to persuade the courts to reverse it.

Thus, Dumpor's Case, 2 Coke, 119, also in 1 Smith's Leading Cases, 85 (1603), was, as Mr. Smith says, "acted on for a long time, although more than once disapproved of. In Doe *v.* Bliss, 4 Taun. 736, Sir James Mansfield, C. J., said: 'The profession have always wondered at Dumpor's case, but it has been law so many centuries that we cannot now reverse it.' And in Brummel *v.* Macpherson, 14 Ves. 173, Lord Eldon said: 'Though Dumpor's case always struck me as extraordinary, it is the law of the land.' Accordingly, it was affirmed by many subsequent decisions" (Smith, p. 87), until the law was changed by statute, 22 & 23 Vict., c. 35, and 23 & 24 Vict., c. 28.

Even treatises are sometimes called authorities, and in the haste of a *nisi prius* trial may no doubt be accepted as such. But the distinction between such an authority and a precedent has been clearly pointed out by a *dictum* of Lord Chancellor Lyndhurst: "Lord Redesdale's treatise has been referred to; but however valuable his treatise may be, it is much more satisfactory when we have from the same eminent judge his opinion declared in the exercise of his judicial duties. For that purpose I will refer to the case of O'Connor *v.* Speight, 1 Sch. & Lef. 309." *Per* Lyndhurst, Ch., in Foley *v.* Hill, 2 H. L. Cas. 28, 38.

But these cases, after all, do not touch the main question of precedent: the reason, and not merely the fact, that "rerum perpetuo similiter judicatorum authoritatem vim legis obtinere debere." Dig. I., 3, 37. (The difference between the meaning of this expression and those which designate merely a force of example, like that which Dr. Lieber has attached to precedent in the text, will be clearly seen by comparing this passage with Inst. II., 23, 1, where a case of the latter kind is mentioned.) So soon as any law comes to be treated as a science, the question must take that form, as we have pointed out before. And the answer given to it will inevitably be that the precedent, as such, cannot bind; there must be a law, or a legislator, behind it, to give it authority. This is the true force of the famous *dictum* of Justinian, Quum non exemplis, sed legibus, judi-

candum sit" (Cod. VII., 45, 13), —a phrase that has perhaps been oftener misapplied than any other in the Corpus Juris Civilis, as if it prohibited the use of precedents altogether.

Duck (De Usu Juris Civilis, Lib. II., p. 381, cap. 8, pars 3, § 8) denied that either our legal writers, Bracton, etc., or our books of reports have the *authority of law*, "for our lawyers' treatises are written by those who have no power of making law; and judges of the present day are not always bound by the precedents of cases adjudged by those of former ages, unless they think them to be applicable to the cases discussed before them. Nor has one equal *imperium* over another; nor has the predecessor more power than he leaves to his successor; nor can any one impose a law on his successor, since the power of both is equal, and judgment is to be given according to the laws, not according to the precedents, as our Emperor Justinian wrote back." He cites various passages of civil and canon law; but it is evident that the whole force of his argument rests on the assumption that the judge must make the law when he adjudicates, if it be law at all, and that this being impossible, the cases are not law. (Compare this with Austin's position as stated further on in this note.)

This answer was very clearly and tersely stated more than a century ago, by a jurist of great reputation in his time: "No custom is obligatory of itself, because there is no reason why the mere repetition of acts should produce an obligation to continue that repetition." In se nulla obligatio est obligatoria, quia nulla est ratio cur ex actuum reiteratione obligatio nasci debeat, ad actus hactenus sæpius susceptos uniformiter continuandos. Hellfeld, Jurisp. Forensis, § 84.

It is evident, too, upon a moment's reflection, that examples and customs cannot be binding of themselves, because much the larger part of them are not so considered by anybody. To make the custom enforceable, there must be something to distinguish it from the great mass of unenforceable customs; and it is in that specific difference, not in its general character as a custom, that its legal quality resides.

Mr. Austin has seen the force of this, and used it as an argument for his own theory, to be mentioned farther on. "*All* the customs immemorially current in the nation are not legally binding. *But* all these customs *would* be legally binding, *if* the positive laws, which have been made upon some of them, obtained as positive laws by force of immemorial usage." Lectures on Jurisprudence, II., p. 556. (The italics in this sentence are in the original.) This is perfectly true, and so far all would agree with

him. He goes on, however, to use an argument of which I cannot see the force. "Positive law made by custom is often abolished by Parliament or by judicial decisions. But supposing it existed as positive law by virtue of the *consensus utentium*, it could not be abolished, conformably to that supposition, without the consent and authority of these its imaginary founders." *Ibid.* But why not? No one has ever claimed that custom had a power superior to that of direct legislation. No answer to Mr. Austin's objection could be more directly appropriate than that of Julian: "*Quid interest* suffragio populus voluntatem suam declaret, an rebus ipsis et factis?" Dig. I., 3, 32.

What, then, is this specific difference which gives the force of law to some customs and not to others? I think the answers now current to this question, at least so far as it has been asked by English and American law, may be reduced to two general types or theories, which may be called, for convenience, the theory of a common law, and the theory of indirect or judicial legislation.

According to the former, precedents are not binding of themselves, but are evidences of the existence and commands of an unwritten law, in accordance with which they are decided. As the civilians express the same thing in the more general form of customary law, the usage is the source of our knowledge of the law, but not the source of the law itself. This distinction was first formulated, so far as I know, by Thomasius, about two centuries ago. He said: "It is not the custom itself that we respect as a law, but it is the law, or other obligation, the existence of which is presumed from the custom. The latter is not a *principium essendi*, but only a *principium cognoscendi*."

But the theory has been held in England, more or less explicitly, from the time when the common law began to be inferred from the decisions of the courts. See Ancient Law, pp. 30, 31. Sir H. S. Maine, though not a believer in it, describes it fairly thus: "When a group of facts come before an English court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is or can be raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the case now litigated, and that if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it." (p. 30.)

This is the same doctrine which St. Germain stated almost four hundred years ago, making the common law to consist of a body of customs and maxims known to the judges alone.

"And because the said customs be neither against the law of God nor the law of reason, and *have been alway taken* to be good and necessary for the common wealth of all the realm; therefore they have obtained the strength of a law, insomuch that he that doeth against them doeth against justice; and these be the customs that properly be called the *common law*. And it shall alway be determined by the justices whether there be any such general custom or not, and not by twelve men [the jury]. And of these general customs, and of certain principles that be called *maxims*, which also take effect by the old custom of the realm, dependeth most part of the law of the realm." Doctor and Student, Dialogue I., chap. 7. The reader should also examine chaps. 8, 9.

It is needless to multiply quotations showing that this has been the accepted doctrine of English law from the beginning. The following statement of it from Blackstone must be quoted here, because it has been the objective point of most of the attacks made by recent opponents who held to the other theory: —

"For it is an established rule to abide by former precedents where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; *not delegated to pronounce a new law, but to maintain and expound the old one.* Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. *But even in such cases, the subsequent judges do not pretend to make a new law*, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined." 1 Bl. Comm. 69.

But where is this common law to be found? If the decided cases are

only deductions from it, and if the judges who decide them really do as they have always claimed, *jus dicere*, not *jus dare*, we ought to be able to point out the law itself from which their rules are drawn, or at least to show where and in what shape it exists. There was no difficulty in doing this when St. Germain and Coke wrote, and so down to the time of Blackstone, even without accepting Sir Henry Maine's insinuation that "the judges of the thirteenth century may have really had at their command a mine of law unrevealed to the bar and to the lay public, for there is some reason for suspecting that in secret they borrowed freely, though not always wisely, from current compendia of the Roman and Canon laws. But that storehouse was closed as soon as the points decided at Westminster Hall became numerous enough to supply a basis for a substantive system of jurisprudence." Ancient Law, p. 31.

It certainly was not the Roman law that the English judges and writers meant during all the long period from the fourteenth to the eighteenth centuries, when they asserted the actual existence of a common law or which their precedents were only the evidence and the results. In the theories then universally accepted, the law of God was a constituent part of human jurisprudence, and the law of nature had as real and definite an existence as any other part of that system. "Scripture est common ley, sur quel touts manieres de leis sont fondés," said Prisot, C. J., in Year Book, 34 Hen. VI., 40. See also Rex *v.* Woolston, Stra. 834, and Hawk. P. C., Book I., chap. 5, § 6.

"Therefore thou shalt understand that the law of England is grounded upon six principal grounds: First, it is grounded upon the law of reason; secondly, on the law of God; thirdly, on divers general customs of the realm; fourthly, on divers principles that be called maxims; fifthly, on divers particular customs; sixthly, on divers statutes made in Parliament." Doctor and Student, Dialogue I., chap. 4.

As the line between religious and temporal law came to be more clearly discerned after the Reformation, the law of God ceased to be quoted, at least under that name, in the courts; but the law of nature and of reason still supplied an ample basis for the theory. The common law was said to be common reason, and Lord Mansfield and his contemporaries repeated again and again the remark that "the reason and spirit of cases make law, not the language of particular precedents." 3 Burr. 1364; 7 Barn. & Cress. 660.

The extravagant and illusory systems of natural law, so current in the

seventeenth and early part of the eighteenth century, produced a reaction at last; and Bentham and others, rushing to an opposite extreme, began to deny the existence of any "law of nature," and the legal authority of any principle or doctrine, that could not be reduced to the narrow conception of a command given by the sovereign. They could not deny the authority of precedents, for that would have been to almost destroy the law of the kingdom. "Judgments of Westminster Hall are the only authority we have for by far the greatest part of the law of England," said Best, C. J., in 3 Bing. 588. But upon their own favorite theory they could not assign to a precedent any authority of its own. If law is necessarily and in its very nature the command of a superior, it would seem to follow that the preceding decision of another subject can no more make law for us than the disobedience of one servant could justify another in the like conduct. This is too plain to have escaped the logical acumen of such a mind as Austin's, and consequently we find that—holding firmly as he did to the theory—he was forced to abandon altogether the doctrine of *precedent*, as such, and to resolve the English authority of decided cases into a species of indirect legislation. In his view, the judge who decides a case of new impression really makes the rule that he professes to find, and his professions of dependence on principles, his uttered distinction between *jus dicere* and *jus dare*, sink to the level, if not of a solemn cheat, at least of a legal fiction.

"The legal rule which is derived from the customary is a rule of *judiciary* law. But though as a rule of judiciary law it is not less positive law than it would be if it were a statute, it often is deemed law emanating from a custom, or *jus moribus constitutum*. For, since the judicial legislator is properly acting judicially, and therefore abstains naturally from the show of legislation, he apparently *applies a preëxisting rule*, instead of making and applying a new rule. And as the preëxisting rule which he appears to apply is apparently the *customary* rule, on which he shapes the positive, the source of that customary rule and the source of the positive law which he virtually establishes are not infrequently confounded. Whether the moral rule be converted into judiciary or into statute law, it emanates as law from the legislator who grounds a statute upon it, or from the judge who assumes it as the base of a judicial decision. The source or *fons* of the legal rule is not *consensus utentium*, although it retains the name of customary law, when clothed with the legal sanction in the judicial mode. Those who maintain that it existed as law before

it was enforced by the legal sanction, or that it was established as law *consensu utentium*, confound law with positive morality, and run into numberless inconsistencies which they cannot possibly avoid. They are obliged to admit that its *continuance* as law depends on the sovereign pleasure; although if it existed as law independently of the will of the sovereign, no one could abrogate it except its authors." Austin, Lectures on Jurisprudence, II., p. 553.

In another passage, Austin speaks of "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody; existing, I suppose, from eternity, and merely *declared* from time to time by the judges." (p. 655.) And the assumption that the judges really legislate by authority from the sovereign, when they decide a case which becomes a precedent, runs all through Mr. Austin's work, and can hardly be fully represented by a brief extract. From him it has been copied by that large school of recent writers, English and American, who regard the "Lectures on Jurisprudence" as the oracle of an entirely new science of law. One of them recently having occasion to refer to Blackstone's view ("that judicial decisions are not the source of laws, but evidence of a preëxisting law"), says that it "would at the present day have few theoretical supporters, though its practical influence is still considerable." Digby, Hist. of Real Property Law, p. 53. Professor J. N. Pomeroy somewhere speaks with even less respect of the old theory, but I have not his book at hand to quote his language.

Sir Henry Maine, who denies entirely the distinction between written and unwritten law, as the terms are now used, states the process by which judge-made law is formed, as follows: —

"At the present moment a rule of English law has first to be disentangled from the recorded facts of adjudged printed precedents; then thrown into a form of words, varying with the taste, precision, and knowledge of the particular judge; and then applied to the circumstances of the case for adjudication. But at no stage of this process has it any characteristic which distinguishes it from written law. It is written case-law, and only different from code-law because it is written in a different way." Ancient Law, p. 13.

I have so much respect for Sir Henry Maine, and such an admiration for the great service he has rendered to the study of English law, — a service greater, I think, than that of any other contemporary writer, — that I

should feel very willing to accept his distinction between case-law and code-law as equivalent to what has commonly been called the distinction between written and unwritten law, if that only would bring his view into harmony with the theory of the common law. The entire effect of the change would then be spent upon the definition given to the term "written law," which, according to him, would mean any law expressed in writing. But we should still have to meet the same question in the distinction of case-law and code-law, and the older form of it is too firmly in possession to be easily dislodged. The essential difference still remains, that the "form of words, varying with the taste, precision, and knowledge of the particular judge," is *not* authoritative, while the form of words in which a legislator has expressed his rule is so. Every tribunal that has occasion to apply the former may criticise it at pleasure, and change the statement of it according to its own "taste, precision, and knowledge," and still decide the case under the same rule of "case-law," as Sir H. Maine would say, or "unwritten law," in the more common phrase. But when the law is "written," or "code-law," he must conform his interpretation and decision to its exact language.

(Sir Matthew Hale has perhaps expressed this distinction more clearly than any other of our purely English writers, in his History of the Common Law.)

Now it is this very distinction that Mr. Austin and all his followers seem entirely to overlook, when they declare that the judge makes law by his decision just as the legislator does by his statute. It would be idle to quote here the innumerable authorities that declare that the force of a precedent does *not* lie in the language of the judge deciding it. It is a commonplace of the bench, that the authority of a case lies in the point decided, and not in the language of the judge; that it is the reason and spirit of the cases which form the law; that the law consists in the principles recognized by the cases, and not in the terms employed. No judge hesitates, even while following a precedent, to criticise the language in which it is stated, or to restate, in a form he deems more exact, the principle upon which the former decision rested.

That the language used by judges in deciding a case is not *authority*, is well established. In Jolly *v.* Rees, 15 C. B. (N. S.) 628, 640 (1864), Chief Justice Erle says: "The plaintiffs rely on observations made by judges, both in Manby *v.* Scott and in some later cases; but the answer, in point of authority, is that the adjudications have not supported the observations

on which they rely. In Manby *v.* Scott those judges were the minority; and the observations referred to in later cases have not been the ground of any decision."

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Per* Marshall, C. J., in Cohens *v.* Virginia, 6 Wheat. 264, 399 (1821). But Mr. Jefferson, who was certainly a good common-lawyer, declared that all the doctrine laid down by the Supreme Court in this very case, and in Marbury *v.* Madison, was *obiter dictum.* Correspondence, vol. 4, p. 75, as quoted in *Southern Law Review*, p. 752 (January, 1876).

"The expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look at in all cases. The manner in which he is arguing it is not the thing; it is the principle he is deciding." *Per* Best, C. J. C. P., in Richardson *v.* Mellish, 2 Bing. 229, 248 (1824). See also what is said by Graves, J., in Lake Shore & Michigan Southern R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275, 281.

I do not see how the followers of Austin can get over this difficulty, consistently with their own definition of a law. Nor do I see how they can explain such cases as Money *v.* Leach, 3 Burr. 1692, where the question of the legality of general warrants was regularly raised for the first time. The report in Burrows contains nothing but a matter of practice with reference to bills of exceptions. The fact was that in the course of the argument Lord Mansfield threw out an opinion against the legality of the warrants, and therefore the attorney-general, Yorke, contrived to be beaten on a by-point, without any decision of the main question. "But without a formal judgment, general warrants have ever since been considered illegal, although they were sanctioned by an uniform usage of ancient standing in the office of the secretary of state." Lord Campbell's Chancellors, VI., p. 370.

The mere hint of a judge could not, on any theory, be supposed to make the law, though it might have the effect of declaring what, in his opinion, it was already.

Nor will Mr. Austin's theory account for the uniform refusal of the courts to declare (or, as he would say, to make) the law in any form than in the decision of a case actually arising and brought before them upon its real facts. The judges of the Supreme Court of the United States, when asked by President Washington to advise him as to the proper exposition of the treaties with France, answered that they considered themselves inhibited from counselling or deciding, in their official character, on political questions, *or on any questions not brought before them in the recognized forms and regular progress of legal controversy.* Marshall's Life of Washington, Vol. V., pp. 441–443. The same position has been repeatedly taken by State courts since.

The innovation made by Mr. Austin's doctrine of judicial legislation is by no means one of pure theory, without influence upon the practical decisions of our courts. A single illustration of its bearings upon actual life must suffice, but it will answer in place of many.

Under the older doctrine it had always been held that every one must be presumed to know the common law, and therefore if a court changed its ruling, and held a class of contracts to be invalid which had previously been considered binding, or *vice versa*, there could be no relief for the disappointment thus brought upon the contracting parties. A new statute could make provision for antecedent contracts, or the courts could distinguish between those formed before it was passed and those formed under it; but any such distinction as to the common law was inconsistent with the accepted theory. That injustice might sometimes be done, and the reasonable expectations of parties deceived by thus holding, was recognized; but it was recognized as one of the inevitable sacrifices to be made for the benefit of a consistent and logical system of law. Rulings of this kind are too numerous and familiar to need citation here.

But it is evident that this reasoning does not apply, if the law enunciated by the judge must be regarded as made by him. It follows necessarily that a change of opinion in the tribunals is a change of the law, and that parties who find themselves affected by it must have the same right to claim the law under which they contracted, as if the change had been brought about by a statute. If every judge is really a legislator, as Mr. Austin and his followers assume, we must enter into the same questions

of retroactive decisions and vested rights that were already familiar to the profession in the field of written law. And such actually has been the jurisprudence of the Supreme Court of the United States, especially upon the much-litigated question of the validity of railroad bonds.

If a contract, when made, was valid under the constitution and laws of a state as they had been previously expounded by its judicial tribunals and as they were understood at the time, no subsequent action by the legislature *or the judiciary* will be regarded by the Supreme Court of the United States as establishing its invalidity. Walker *v.* Whitehead, 16 Wall. 314; Olcott *v.* The Supervisors, etc., 16 Wall. 678.

The laws which exist at the time of making a contract, and in the place where it is made and to be performed, enter into and make part of it. This embraces those laws alike which affect its validity, construction, discharge, and enforcement. No distinction is made by the court between statute and common law, in this respect. *Ibid.*

In Woodruff *v.* Woodruff, and same *v.* Robinson, 52 N. Y. Ct. App. 53 (1873), the doctrine is recognized that "*a subsequent decision is a legal adjudication that the prior one was not the law at the time it was made.*" (Applied to Knox *v.* Lee, 12 Wall. 457, overruling Hepburn *v.* Griswold, 8 Wall. 603, on the validity of the Legal-Tender Acts.) But it was held that where, pending the first case, a contract was made to be governed by its decision, — *i.e.*, to pay gold if the court held the Legal-Tender Act unconstitutional, — the parties would be held to it, although the decision was afterward reversed.

(Note, however, that the contract in this case was to pay gold "if such a decision was made and became the law of the land;" and the court *assume* that the parties contracted with reference particularly to the former case then pending. Their reasoning in this respect seems to me not entirely satisfactory.)

In conclusion, I venture to say — although a note like this is not the place for the full discussion of so important a question — that I hold the view of Blackstone and all the older writers upon the common law to be the true one, and that presented by Mr. Austin and his followers to be a radical mistake. The inconsistencies and errors of many of the former statements of the common-law doctrine are freely admitted; but they are of very little consequence as against their general accord and consistence. The belief in a common law, of which all precedents and decided cases are merely the evidence and exposition, cannot be a delusion or a fiction,

so long maintained. Unless we are willing to surrender entirely the belief that there is a Divine order in the moral as well as physical constitution of this world, we cannot assume that all the principles upon which cases of the first impression have been decided for centuries were the creation of the judges who wrote or uttered the particular opinions. Nor can we say that our English and American judges have *made* the law which they expounded, unless we are willing to admit that the whole course of their jurisprudence for at least six centuries has been an unjust government of litigants by rules that did not exist when they entered into the transactions adjudged. The new view, that they were really making law while they professed only to expound it, seems to me to rest entirely upon the assumption that all law must necessarily be legislation, — a rule or rules promulgated beforehand in writing, by some earthly sovereign whom the people are bound to obey. The old doctrine rested on the assumption that there were fixed principles of jural as well as moral right, which every man was bound to obey, and which every magistrate was bound to recognize and enforce to the best of his knowledge and ability.

The mistake made by the older advocates of this view was merely in taking for granted that these principles were perfectly known to them, and that the law of reason, of nature, or of God, as they understood it and could formulate it in words, was the standard of *jus* for all time. They overlooked the fact that our notions of nature and natural law depend upon our knowledge and education in moral as well as physical science.

(Dean Swift, who, though not a lawyer, was a man of wonderful insight, and familiar, too, with all the moral and political science of his day, — probably also knowing more of the true science of law, as distinct from its technicalities, than a majority of the contemporary practitioners of the art, — in his satirical essay on the "Right of Precedence between Physicians and Civilians," has, in a mere passing remark, shown the identity of natural and customary law, or the fact that what is customary is what will be regarded as natural, more effectively than many labored disquisitions: "For that I take to be the meaning of nature in most cases, viz., what is found reasonable in itself, and has been always agreed to by mankind, and is confirmed by constant and uninterrupted practice.") Works, XII., p. 46 (New York, 1812, 12mo).

We can improve upon the fathers of the common law, not by rejecting their belief in the existence of such a law, but by recognizing the fact

that it must be learned, like the laws of the physical world, inductively. The decided cases of the past are so many observations upon the practical working of these laws, from which the true theory is to be inferred, — precisely as the astronomer infers the true form of the planet's orbit from his observations of its position at many different times. The observed facts are authoritative: our inferences from them are theory; but it is the formation of that theory which enables us to carry our observations on farther and more intelligently, and thus to arrive gradually at the true understanding of the laws that govern the moral as well as those that govern the material universe.

This explanation of the true office of precedents, as data from which we may obtain by induction the jural rule which they prove to exist, is not only the most reasonable in itself, but it has been recognized by high judicial authority.

In Bates *v.* Relyea & Wright, 23 Wend. 336 (1840), Cowen, J., discusses a question of the interpretation of a statute (Stat. N. Y. 1831, p. 403, § 33), and bases the decision upon a former case, — Clark *v.* Lee, 15 Wend. 479, — in spite of *dicta* to the contrary in Ackerman *v.* Welch, 15 Wend. 652. It is evident that he bases his present decision rather on the rule of *stare decisis* than upon original reasoning. (p. 340, at foot.) He then goes on: "The decisions of this court, [New York Supreme Court] while unreversed, always formed the absolute law of the case, and entered with very decisive effect into the body of precedents. *They must, from the nature of our legal system, be the same to the science of law as a convincing series of experiments is in any other branch of inductive philosophy.* They are, on being promulgated, immediately relied upon, according to their character, either as confirming an old or forming a new principle of action, which perhaps is at once applied to thousands of cases. These are continually multiplying throughout the whole of our jurisdiction. * * * The court almost always, in deciding any question, creates a moral power above itself; and when the decision construes a statute, it is legally bound, for certain purposes, to follow it as a decree emanating from a paramount authority."

We may properly search in history for the first recognition and growth of each rule, doctrine, or institution of the common law; but it is a mistake to look there for the origin of the common law itself, because we cannot get back to a period when society existed at all and yet existed without it. To imagine such a period is as great a mistake as that made

a century or more ago, in assuming a state (and law) of nature before society was formed. The base of the common law (as of *a* common law) is found in man's nature. When the question, "Is it right to do so and so?" can be asked, the answer implies a law. Every individual's reflection upon his own proposed action, every conscious purpose, implies a law. When such a question arises between two persons, there is no need of an *arbiter* to lay down the law. They cannot discuss or dispute, upon any ground above brute force, without assuming that there is a law to decide between them. The various methods of determining what the law is — precedent, custom, equity, legislation, etc. — are all afterthoughts.

It would be easy to show, if space permitted, that the common-law doctrine of precedent has always been recognized by the highest authorities upon the subject in other lands. The use of reported cases is well known in the civil-law countries, although they have not had the relative importance there which they have enjoyed in England. Of late years they seem to have gained in popularity, and the number of the reported decisions of French, German, Italian, and other courts now published in regular series is very great. It is remarkable too that the German jurists, who have heretofore disregarded them entirely in the profuse citations appended to their works, are now beginning to quote them and reason from them very much in the English manner. The notes to the Pandects of Prof. Windscheid, the distinguished successor of Vangerow at Berlin, are full of references to Seuffert's "Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten," an admirable publication, now in its thirty-fifth volume, which gives in a single yearly volume of four numbers a clear and methodical summary of the most important decisions made in its wide field. It were much to be wished that among our many American periodicals that fill their pages with a repetition of the same recent cases, or with interminable collections of head-notes, — miscalled digests of recent decisions, — there were one edited upon the same plan, and with the same learning and discrimination.

An acute discussion of the theory of precedent will be found in the little treatise of Dupin, De la Jurisprudence des Arrêts, forming a part of his Manuel des Etudians en Droit, et des jeunes Avocats. (Bruxelles, 1825.) Arrêt is the French term for a legal precedent or reported case of a court of ultimate jurisdiction. "Know ye that from an Arrêt of Parliament [the highest French court of that time] there can be no appeal; and therefore it is called arrêt because it arrests, and puts an end to the contro-

versy." Bouteiller, Somme rurale, tit. 21, p. 93. Bouteiller wrote in the fourteenth century, at a time when the theory of French law was almost identical with that of England, except that the latter country had already thrown off the yoke of the Roman law, which for a century or more had been as much felt there as in the neighboring part of the continent.

A very interesting account of the older European reports, and particularly of those of the *Rota Romana*, the Papal Court of Appeals, which exercised a wide jurisdiction and immense influence on the law, will be found in the prefaces to Hoepfner's edition of Mevii Decisiones (Francofurti, 1791). One of these prefaces, by J. H. Böhmer, is printed also in the first volume of that author's Exercitationes ad Pandectas, pp. 687–735, ed. Hanov, 1745.

NOTE O.

THE CASE OF STRADLING v. STYLES.

The report of the famous case of Stradling *v.* Styles, referred to by Dr. Lieber at page 76 of the text (the defendant's name being there misprinted Swale), is undoubtedly the most famous, and perhaps the wittiest of the many parodies of legal cases. But its wit is too purely professional to be generally relished. The imitation of the ancient law-French reporters would hardly be understood, excellent as it is, by a generation that never reads them. In the author's solution of the question, he seems to assume that it was written in English; since otherwise his comments on the mere collocation of the words would hardly have a meaning. But the report itself is in the jargon of the early reporters.

It appeared originally as a fragment of that proposed satire upon pedantry, the Memoirs of Martinus Scriblerus, and may be found in Pope's Prose Writings. (Pope's Complete Works, Vol. V., pp. 307–311; London, 8 vols., 1847.) Pope, Swift, and Arbuthnot were the chief creators of Scriblerus; but this particular *jeu d'esprit* has been attributed to Mr. Justice (afterward Lord) Fortescue.

It has been supposed that the first suggestion for Stradling *v.* Styles was found in the following real case, and the resemblance is certainly curious: —

"HAMMOND *v.* OUDEN, 12 Modern, 421; B. R. 12 Wm. III.

"Action on the case. The plaintiff declared that, in consideration of seventy pounds paid by him to the defendant, the defendant super de

assumpsit to deliver to the plaintiff, on or before the eighteenth day of January following, on board the plaintiff's ship, in such a place, twenty-five quarters of oatmeal, and six hair and splitted sieves. The plaintiff alleged that he did bring his ship, on the said eighteenth of January, to the said place, and that the defendant did not deliver to him, etc. Verdict and damages for the plaintiff.

"Cowper took exceptions to the declaration. First, that it was altogether uncertain, so that a jury could not assess damages upon it; for it did not appear how many of the sieves were to be hair and how many splitted. * * *

"But *per Curiam:* As to the first, if a man bind himself to give another six cows and horses, it must be six of each, and it shall be taken severally as strongest against the grantor. Besides, here it is laid, 'sex scribas,' *Anglice* hair and splitted sieves; and we cannot take notice but a hair sieve and a splitted one are the same."

[I omit the second ground of exception and decision, which is much longer, and turns on a commonplace question of pleading.]

Mr. F. F. Heard, in that amusing little work "The Curiosities of the Law-Reporters," p. 70, refers to White *v.* Brough, 1 Roll. 286, as deserving a place beside Stradling *v.* Styles. It certainly deserves notice as a specimen of ingenious *mis*interpretation.

"If one man says to another, 'Thou hast stolen me (innuendo, the defendant) an hundred of slate,' no action lies, because the innuendo has made the words repugnant; for he could not steal the defendant, as it must be taken by the words." So, in the next case to this, quoted in 1 Vin. 509, it was said not to be slander to accuse a man of having put to death four or five of his own children, because he *might* have executed them as a minister of justice! Keymer *v.* Clark, Latch, 159.

NOTE P.

THE CASE OF SIBYL BELKNAP.

Very few cases from the Year Books have been mentioned so often of late years as this; and the rhyming distich of Chief Justice Markham is probably better known than his most learned judgments upon the law, of which he was unquestionably a master. But I quote it here, less for its

intrinsic interest than for its bearing upon the question how far the Year Books can be depended upon as authority for the early English law. This has so commonly been taken for granted, that it may seem presumptuous now to question it.

Most of our recent writers, who mention the Year Books at all, repeat the story that they were edited by official reporters, whose salary for that purpose was paid from the public treasury. There may be some authority for this of which I am ignorant; but I have never been able to find any mention of it, or any thing from which it could be inferred, of an earlier date than the proposed reëstablishment of the office in the reign of James I., almost a hundred years later than the date of the latest Year Book. These "books," as they were long called by such writers as Coke and his followers, have an importance in the history of our law that would repay the most careful investigation of their authorship; and it is not creditable to our profession that no effort has yet been made to ascertain the exact amount of reliance that can be placed on their statements.

An examination of this particular case is certainly not encouraging to those who would regard them as official oracles of the common law in its most important period. It is a little remarkable that we can trace all the modern versions of the story to a book written by a lord chancellor of England, and from him to the speech of a lord chancellor more than two centuries earlier, and from him again two centuries to a *dictum* of the same court that first made the decision, just one year after it was made, and yet find that the original case has been for four hundred and seventy-five years entirely misstated, and that even the parties in it have been exactly transposed, and that there never was "a woman who brought the king's writ, not naming her husband, joined by the oak of the law"! (Did this *robore legis* have any thing to do with Blackstone's stick no larger than the husband's thumb?)

Lord Campbell, in his Life of Robert Belknappe, chief justice under Richard II., says that his wife Sibbella held certain estates in her own right; and bringing an action during his banishment, for an injury done to one of them, the question arose whether she could sue alone, being a married woman. But it was adjudged that, her husband being disqualified to join as a plaintiff, she was entitled to the privilege of suing as a *feme sole;* although Chief Justice Markham exclaimed, —

"Ecce modo mirum, quod femina fert breve regis,
Non nominando virum conjunctum robore legis."

(Lives of the Chief Justices, I., p. 116. The story is also referred

to in a note to the life of Lord Kenyon, Vol. IV., p. 52.) Lord Campbell refers to, and evidently follows, the account of the same matter given by Lord Ellesmere in the case of the Postnati, 2 Howell's State Trials, pp. 559, 677, and criticises the older chancellor's statement that the banishment was into Gascony, — showing that it was really into Ireland. But Ellesmere followed directly in this the authority that he cites, Mich., 2 Hen. IV., 7, quoted below. The strangest part of the whole is that this latter account, printed in the same book, and within six pages of the original authority, should so entirely misstate the original case in the most important point. This will be better seen by a literal translation of the two passages.

"Y. B. Mich., 1º Hen. IV., fo. 1, pl. 2. Our Lord the King brings a writ of ward against Sybell Belknap, and the writ brought by the King was awarded good. *Cokeine.* Judgment of the writ, since she was covert when the writ was purchased, etc. *Skrene.* Your husband, for a crime which he committed against the King and divers of his peers, was banished to Gascony, to remain there until pardoned by the King. Wherefore Gascoigne, ex assensu sociorum, said to the defendant, answer: and thereupon she pleads in bar."

But the year after, in a case where a monk was plaintiff (Mich., 2º Hen. IV., fo. 7, pl. 26), this case was mentioned in the following words: "And it was there testified by the justices that the wife of Sir Robert Belknap, who was exiled, sued a writ alone, her husband not being named in the writ. And by their award the suit was held sufficient, because her husband was attainted in law." (Markham then breaks out into the rhyming *dictum* above quoted, which the reporter prints as cold prose!) "And other judges said that the reason was because she was the king's farmer."

We might suspect that this later *dictum* stated the case correctly, and that the mistake was in the earlier report, if we did not find a reference from that report to a still earlier case, in which the wife was also defendant, and not plaintiff as the modern story takes for granted.

"Y. B. Mich., 10 Ed. III., pl. 37, fo. 53. The King brought Quare impedit against Dame de Maltravers; and she pleaded that she was covert, and demanded judgment of the writ. *Parnell.* Her husband is in exile for certain reasons; and we demand judgment whether our writ is not good. *Ston.* The King favors you greatly in bringing a writ against you." And the reporter then adds: —

"Quære de ista materia, quia nihil dictum fuit: sed opinio fuit, that she should answer"!

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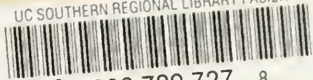
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